

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |                      |
|---|---|----------------------|
| In the Matter of                        | ) |                      |
|   | ) |                      |
| 2010 Quadrennial Regulatory Review –    | ) | MB Docket No. 09-182 |
| Review of the Commission’s Broadcast    | ) |                      |
| Ownership Rules and Other Rules Adopted | ) |                      |
| Pursuant to Section 202 of the          | ) |                      |
| Telecommunications Act of 1996          | ) |                      |
|   | ) | MB Docket No. 07-294 |
| Promoting Diversification of Ownership  | ) |                      |
| In the Broadcasting Services            | ) |                      |

To The Commission

**SUPPLEMENTAL COMMENTS OF THE DIVERSITY AND COMPETITION  
SUPPORTERS IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING**

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## **Summary and Background**

The Diversity and Competition Supporters (DCS)<sup>1</sup> respectfully submit these supplemental comments in response to the 2010 Quadrennial Regulatory Review Notice of Proposed Rulemaking (“NPRM”).<sup>2</sup> As stated in our Initial Comments, DCS urges the Commission to adopt the many long pending, pro-diversity proposals before the Commission.<sup>3</sup> These proposals, which encompass structural ownership rule reforms, FCC process reforms, and engineering rule revisions,<sup>4</sup> were submitted to address the barriers to diverse participation in media ownership and to increase minority and women participation in broadcasting.<sup>5</sup> As promised in our Initial Comments, this Supplement compiles, explains, and updates the previously submitted proposals.<sup>6</sup> Proposals that rely on the vacated eligible entities definition

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<sup>1</sup> The Diversity and Competition Supporters (see Appendix) is a coalition, now comprised of 50 national organizations, that was created in 2002 to advance the cause of minority ownership in MB Docket No. 02-277 and subsequent dockets. These Supplemental Comments and all subsequently filed pleadings reflect the institutional views of each of the Diversity and Competition Supporters, and are not intended to represent the individual views of each of the Diversity and Competition Supporters’ officers, directors and members.

<sup>2</sup> See 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MB Docket No. 09-182 et al. (Dec. 22, 2011) (“NPRM”).

<sup>3</sup> See Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, 2010 Quadrennial Regulatory Review, MB Docket No. 09-182, et al. (Mar. 5, 2012) at 21-37, available at <http://apps.fcc.gov/ecfs/document/view?id=7021898416> (last visited Mar. 29, 2012) (“DCS 2012 Initial Comments”). See also MMTC Ex Parte Letter re: Diversification of Broadcast Ownership, MB Docket No. 07-294, et al., Attachment (Mar. 24, 2010), available at <http://apps.fcc.gov/ecfs/document/view?id=7020397317> (last visited Mar. 29, 2012). These proposals have since been reduced to 72 proposals. See 72 Proposals Pending Before the Federal Communications Commission To Advance Minority Media and Telecommunications Ownership and Employment (May 11, 2010) (on file with MMTC).

<sup>4</sup> See DCS 2012 Initial Comments at p. 21.

<sup>5</sup> See id. at pp. 4-10 (discussing the decline of minority ownership, barriers to diverse participation, and the Commission’s diverse ownership policy goals).

<sup>6</sup> See id. at p. 21 n. 91.

should not be discarded but should be amended to incorporate a valid eligible entities definition, once it is crafted, or the Overcoming Disadvantage Preference.<sup>7</sup>

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<sup>7</sup> See id. at pp. 14-15, 19-21; see also Advisory Committee on Diversity for Communications in the Digital Age, Recommendation on Preference for Overcoming Disadvantage at pp. 3-4 (Oct. 14, 2010), available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Recommendation on Preference for Overcoming Disadvantage” (last visited Mar. 29, 2012) (The Diversity Committee recommended that the Commission create a new preference program for individuals who have faced and overcome, at least in part, substantial disadvantages. This proposal would grant a preference to “qualified applicants who (1) have experienced a disadvantage (2) that had a substantial negative impact on their entry into or advancement in the professional world or other comparable context and (3) that they have substantially overcome.”)

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DCS urges the Commission to take prompt action to consider and implement the following 47 proposals to increase diverse participation in the broadcast industry. Where these proposals rely on an “eligible entities” definition, DCS encourages the Commission to develop and incorporate a valid eligible entities definition or use the Overcoming Disadvantage Preference.<sup>8</sup>

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<sup>8</sup> See DCS 2012 Initial Comments at pp. 14-15, 19-21.

**1. Minority Ownership Incubation Proposal [Proposal 20].<sup>9</sup>**

As stated in the Initial Comments, DCS urges the Commission to adopt this long pending incubator proposal, which has been before the Commission for more than 20 years.<sup>10</sup> The

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<sup>9</sup> As stated in the 72 Proposals, the request was to allow a structural rule waiver for selling a station to a socially and economically disadvantaged business (“SDB”), where sale to the SDB is ancillary to a transaction that otherwise would be barred by an ownership rule. See Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, 2006 Quadrennial Regulatory Review – Review Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121 et al. (Oct. 1, 2007) at p. 9, available at <http://mmtconline.org/lp-pdf/DCS-MO-Comments-100107.pdf> (last visited Mar. 29, 2012) (“DCS 2007 Initial Comments”). As explained herein, this proposal has been refined and improved in some respects.

<sup>10</sup> See Comments of the Diversity and Competition Supporters in Response to the Notice of Inquiry, 2010 Quadrennial Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182 (July 12, 2010) at p. 22 n. 84, available at <http://mmtconline.org/lp-pdf/DCS%202010%20MediaOwnComments%20071210.pdf> (last visited Mar. 29, 2012) (“DCS 2010 Ownership Comments”) (illustrating the history of the proposal through a progression of dockets since 1992). A proposal to allow structural rule waivers for creating incubator programs was introduced by the 1992 Minority Ownership Task Force. See DCS 2007 Initial Comments at pp. 11-12. The incubator proposal was endorsed by each of the Commissioners in office in 1992 and again in 1995. See Revision of Radio Rules and Policies, MM Docket 91-140, Reconsideration, 7 FCC Rcd 6387, 6391-92 ¶¶21-25 (1992); Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities MM Docket No. 94-149, Notice of Proposed Rulemaking, 10 FCC Rcd 2788, 2791-94 ¶¶15-24 (1995). In 1995 it was included in the minority ownership proceeding. See id. This docket was closed in 2002. See Termination of Stale or Moot Docketed Proceedings, Order, 17 FCC Rcd 1199, 1205 (2002). The incubator proposal was also introduced by DCS into a 2001 proceeding that was later consolidated into the 2002 Biennial review. See DCS 2007 Initial Comments at p. 12 n. 47 (citing Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket 01-317, 16 FCC Rcd 19861 (2001); Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 17 FCC Rcd 18503, 18506 ¶7 (2002)). The Diversity Committee endorsed the incubator proposal in 2004. See Recommendation of the Financial Issues Subcommittee, Advisory Committee for Diversity in the Digital Age (June. 14, 2004) at p. 6, available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Incentive-Based Regulations” (last visited Mar. 29, 2012) (“2004 Recommendation on Incentive Based-Regulations”). DCS expanded upon the 1992 proposal and offered additional suggestions as to what might qualify for incubation activities, including creating an HBCU business planning center for minority entrepreneurs, training similar to the National Association of Broadcasters Foundation’s Broadcast Leadership Training Program, a line of credit for SDBs, and financial investments and mentorship opportunities for SDBs. See



incubator proposal – unopposed since its origin in the Commission’s Minority Ownership Advisory Committee in 1990 – has garnered praise from Commissioners and has been supported by DCS in previous proceedings.<sup>11</sup> It was favorably acknowledged by Commissioner Michael Copps in his statement accompanying the NPRM,<sup>12</sup> and would use structural rule waivers to incentivize broadcasters to finance or incubate disadvantaged businesses.<sup>13</sup> Once a business engages in a qualifying incubating activity, the local radio ownership rule would be waived such that the business could exceed the ownership limits by one station per incubating activity, thus encouraging new entrants.<sup>14</sup> Through various FCC dockets, the incubator proposal has undergone change over the years.<sup>15</sup> In its present form, DCS advocates that the Commission should allow: “Structural rule waivers for companies that take actions to ‘incubate’ (i.e., engage

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DCS 2007 Initial Comments at p. 13 (citing Initial Comments of Diversity and Competition Supporters, MB Docket 02-277 (Jan. 2, 2003) at p. 105, available at <http://mmtconline.org/lp-pdf/BroadcastOwn-Comments.pdf> (last visited Mar. 29, 2012) (“DCS 2003 Comments”). In the course of the 2006 quadrennial regulatory review proceeding, DCS further modified the incubator proposal in its Supplemental Comments. See Supplemental Ex Parte Comments of the Diversity and Competition Supporters In Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121 et al. (Nov. 20, 2007) at pp. 5-8, available at <http://mmtconline.org/lp-pdf/071120-DCS-MO-SuppComments-112007.pdf> (last visited Mar. 29, 2012) (“2007 DCS Supplemental Ex Parte Comments”).

<sup>11</sup> See p. 4 n. 9 supra.

<sup>12</sup> See NPRM at p. 95 (Commissioner Copps states that he is “pleased to see the proposal for an incubator program teed up for comment in the NPRM.”)

<sup>13</sup> See, e.g., MMTC Ex Parte Letter re: 2010 Quadrennial Review, MB Docket No. 09-182, et al., (Sep. 7, 2011) at p. 3 (“MMTC Sep. 7 Ex Parte Letter”).

<sup>14</sup> See id.

<sup>15</sup> Addressing concerns about the potential increase in consolidation as a result of the incubation proposal, DCS proposed a narrow two-year Trial Incubation Plan. See 2007 DCS Supplemental Ex Parte Comments at pp. 6-7. The Commission then sought comment on the Trial Incubation Plan in its Diversity Order. See Promoting Diversification of Ownership in the Broadcasting Services, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5946 ¶¶68, 5955-56 ¶¶97 (2008) (“Diversity Order”). In the 2010 quadrennial review proceeding, DCS renewed its request for a broad incubator proposal, not limited to the Trial Incubation Plan. See DCS 2010 Ownership Comments at p. 24 (“...given the state of minority ownership and the relatively few opportunities to enter the market, we propose that the incubation proposal apply to all markets at this time, including additional steps mentioned above that might qualify towards an incubation credit.”)

in actions that enhance radio station ownership opportunities) SDBs.”<sup>16</sup> The incubator proposal envisions waiver of the local radio ownership rule when applicable to accommodate ownership for the incubator. Activities that would qualify for the incubator waiver should be measured on an ongoing basis to ensure the effectiveness of the incubating activity in increasing opportunities for SDBs, without abuses. These activities might include:

- Sale or donation of a commercial radio station to a qualified entity on the condition that the recipient of a donated station certify that it will hold the station license for a period of three years following closing of the transaction effectuating the donation, subject to exceptions for economic distress or subsequent sale or donation to another qualified entity;
- Five years of an LMA operating structure for an independent programmer on an FM HD-2 or HD-3 channel, with the independent programmer obligated to pay the licensee no more than the licensee’s actual out-of-pocket expenses associated with operation of the subchannel;
- Underwriting, including financing of one year of operations and the in-kind provisions of technical or engineering assistance or equipment that enables the re-activation and restoration to full service of a dark commercial or noncommercial station licensed to an eligible entity where the licensee or permittee certifies that it is otherwise unable to resume or commence service prior to the date on which the license or permit would be cancelled by operation of law;
- Arranging for the donation of a commercial or noncommercial station to a Historically Black College or University (HBCU), a Hispanic Serving Institution (HSI), an Asian American Serving Institution (AASI) or a Native American Serving Institution (NASI).
- Providing loans, loan guarantees, lines of credit, equity investments, or other direct financial assistance to a qualified entity to cover more than 50 percent of the purchase price of a radio station;
- Another action that the company seeking a waiver demonstrates is likely to enhance radio station ownership opportunities for qualified entities.<sup>17</sup>

The qualified activity must occur in the same market or a market at least as large as the market where the transaction occurs.<sup>18</sup> Each qualifying activity could be granted a waiver, and

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<sup>16</sup> See, e.g., MMTC Sep. 7 Ex Parte Letter at p. 3.

<sup>17</sup> See id. at pp. 3-4.

station groups resulting from waivers would be permanently grandfathered without needing a new waiver.<sup>19</sup>

## **2. Relax Broadcast Foreign Ownership Restrictions [Proposal 23].<sup>20</sup>**

As stated in our Initial Comments, the Commission should relax its foreign ownership policies pursuant to Section 310(b)(4) of the Communications Act. Such relaxation will not only provide new funding options for minority broadcast entrepreneurs,<sup>21</sup> but will also give all U.S. broadcasters the opportunity to increase their investments in foreign broadcast outlets.<sup>22</sup>

The Commission currently restricts foreign investment in broadcast facilities.<sup>23</sup> However, the foreign ownership restrictions in Section 310(b)(4) of the Communications Act are outdated in light of a sea change in communications technology and the advent of a global

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<sup>18</sup> See id. at p. 3.

<sup>19</sup> See id. at p. 5.

<sup>20</sup> See Recommendation on Adoption of a Declaratory Ruling on Section 310(b)(4) Waivers, Advisory Committee for Diversity in the Digital Age (Dec. 10, 2004), available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Foreign Ownership” (last visited Mar. 29, 2012). See also DCS 2007 Initial Comments at pp. 37-39.

<sup>21</sup> For example, MMTC referenced how the number of Spanish language broadcasters has decreased over the past few years due to the lack of capital investment. See generally Comments of the Minority Media and Telecommunications Council, Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended, IB Docket No. 11-133 (Dec. 1, 2011) at pp. 3-9, available at <http://mmtconline.org/lp-pdf/MMTC%20310b4%20Comments%20120111.pdf> (last visited Mar. 29, 2012).

<sup>22</sup> In 2008, the Commission denied MMTC’s request to relax the foreign ownership policy, and MMTC, joined by 28 other national organizations, sought reconsideration of the FCC’s denial of a petition to relax the policy. That petition remains pending. See Petition for Partial Reconsideration of 29 Organizations, Promoting Diversification of Ownership In Broadcasting Services, MB Docket No. 07-294 (June 16, 2008), available at <http://mmtconline.org/lp-pdf/DCS-Diversity-Recon-061608.pdf> (last visited Mar. 29, 2012).

<sup>23</sup> Section 310(b)(4) provides that “No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by any corporation directly or indirectly controlled by any other corporation of which more than one-fourth the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.” See 47 U.S.C. §310(b)(4) (2012).

economy. Congress enacted the predecessor to Section 310(b)(4) during the tumultuous climate of the early twentieth century when the U.S. was preparing for World War I.<sup>24</sup> Moreover, when Congress first enacted foreign ownership restrictions, only a handful of radio stations were licensed.<sup>25</sup> At that time, Congress was concerned that foreign investments would influence U.S. security.<sup>26</sup>

Today, however, social media, enabled by the Internet, has substantially changed the way organizations, communities and individuals communicate, eclipsing broadcasting's ability to dominate the marketplace of viewpoints relating to national security and myriad other topics and issues affecting daily life.<sup>27</sup> There are thousands of radio and full power television stations, LPTVs, and other mass media such as cable. Indeed, U.S. media is the most dominant media in the world.<sup>28</sup> There is a much greater likelihood of American ideals and viewpoints impacting those living abroad, than the reverse because American broadcasting is so ubiquitous.<sup>29</sup>

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<sup>24</sup> As the most efficient and pervasive means of addressing the public, regulating foreign access to U.S. broadcasting was then thought to be imperative in order to protect national interests. (Although we have previously asserted that concern about foreign propaganda was a major factor at the time, it is not clear that this was the case.)

<sup>25</sup> See Greg Snodgrass, Business Solutions to the Alien Ownership Restriction, 61 Fed. Comm. L.J. 457, 458 (2008). "Since 1912, Congress has outlawed foreign ownership or control of a broadcast station. This restriction is codified in its current form under the Communications Act of 1934 (1934 Act).

<sup>26</sup> Id. at 458.

<sup>27</sup> It is difficult to envision foreign investors – especially WTO members – endangering our national security through their ownership stakes in broadcast stations.

<sup>28</sup> See Tim Arango, World Falls for American Media, Even as It Sours on America, New York Times (Nov. 30, 2008), available at [http://www.nytimes.com/2008/12/01/business/media/01soft.html?\\_r=1](http://www.nytimes.com/2008/12/01/business/media/01soft.html?_r=1) (last visited Mar. 29, 2012).

<sup>29</sup> Voice of America and other American international broadcasters now reach 187 million people every week, an increase of 22 million from 2010 and an all-time record number of listeners and viewers. For example, 2011 data shows that three-quarters of the entire country watches or listens to American broadcasts. See Adam Clayton Powell III, U.S. International Broadcasting Reaching Record Audience Accessing Impact Questioned, U.S.C. Center on Public Democracy at the Annenberg School (Nov. 17, 2011), available at

An examination of the cable industry shows that the absence of foreign ownership restrictions in that industry has posed no danger of foreign domination of that industry, and if the foreign ownership policies are relaxed, it is reasonable to conclude that there would be no danger to the broadcast industry.

Similarly, there is no logical reason to disallow foreign investment in U.S. broadcasting but permit foreign investment in wireline carriers and other non-broadcast facilities. As noted, in the realm of cable television, another medium of mass communications, there are no foreign ownership restrictions, and there is absolutely no evidence that there have been any adverse consequences where systems (or cable stations) are owned or operated by foreign entities. Nor has the Commission expressed any concerns where radio stations, full power television stations, Class A stations, and LPTV stations are programmed by non-citizens under LMAs or similar arrangements. Arguably, a foreign investor would have a greater ability to influence U.S. security by having a controlling stake in T-Mobile and by investing in U.S. telecommunications infrastructure than by owning more than 25 percent of two local broadcast channels in Maryland. A foreign investor's passive investment in a U.S. broadcast channel is no danger to the nation's security because Section 706 of the Communications Act and other federal laws provide ample protection.<sup>30</sup>

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[http://uscpublicdiplomacy.org/index.php/newswire/cpdblog\\_detail/us\\_international\\_broadcasting\\_reaching\\_record\\_audience\\_assessing\\_impact\\_q/](http://uscpublicdiplomacy.org/index.php/newswire/cpdblog_detail/us_international_broadcasting_reaching_record_audience_assessing_impact_q/) (last visited Mar. 29, 2012).

<sup>30</sup> Section 706 of the Communications Act states that "The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." See 47 U.S.C. §1302 (2012).

By relaxing foreign broadcast investment policies, while maintaining the present policy requirement for foreign investors holding a non-controlling interest, U.S. broadcasters, particularly minorities, who have difficulty access capital, would have access to new sources of capital that are not available to them under the current regulatory paradigm.

### **3. Reinstating And Expanding The Tax Certificate Policy [Proposal 72]<sup>31</sup>**

As shown in our Initial Comments, the Commission should reinstate and expand the successful Tax Certificate Policy. Tax incentive policies have been the most effective measures to increase broadcast diversity. The Commission adopted the Tax Certificate Policy in 1978 to provide companies with an incentive to increase minority media ownership.<sup>32</sup> The policy allowed companies to defer capital gains taxation on the sale of media properties to minorities. During the 17-year lifetime of the previous tax certificate policy, which was repealed by Congress in 1995, “the FCC granted 356 tax certificates – 287 for radio, 40 for television and 30 for cable franchises.”<sup>33</sup> Since the policy’s demise, several members of Congress have sought to reintroduce the policy and these efforts have gained support with civil rights organizations, industry and industry associations.<sup>34</sup> Because of its effectiveness, the Commission should

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<sup>31</sup> See Recommendation on a Tax Incentive Program, Financial Issues Subcommittee, Advisory Committee for Diversity in the Digital Age (June 14, 2004), available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Tax Incentive Program” (last visited Mar. 29, 2012).

<sup>32</sup> See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1979).

<sup>33</sup> See Catherine J.K. Sandoval et al., Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest (2009) at p. 14, available at [http://mmtconline.org/lp-pdf/Minority\\_Commercial\\_Radio\\_Broadcasters\\_Sandoval%20MMTC\\_2009\\_final\\_report.pdf](http://mmtconline.org/lp-pdf/Minority_Commercial_Radio_Broadcasters_Sandoval%20MMTC_2009_final_report.pdf) (last visited Mar. 29, 2012).

<sup>34</sup> See MMTC Road Map for Telecommunications Policy (July 21, 2008) at p. 1-2, available at <http://mmtconline.org/lp-pdf/MMTC-Road-Map-for-TCM-Policy.pdf> (last visited Mar. 29, 2012) (“Legislation has been introduced in Congress to restore the policy and extend it to telecommunications. Bills introduced in 2003 by Senator John McCain and in subsequent years

continue to endorse<sup>35</sup> and work with Congress to develop a renewed and updated Tax Certificate Policy.<sup>36</sup>

#### **4. Migrate Most AM Service To VHF Channels 5 And 6 [Proposal 47].<sup>37</sup>**

DCS believes that Channels 5 and 6 should continue to be evaluated to determine which use will provide the greatest impact.<sup>38</sup> Post-DTV transition, these channels represent a

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by Congressman Charles Rangel and by Congressman Bobby Rush were not given hearings in the House Ways and Means Committee.”)

<sup>35</sup> See Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, 26 FCC Rcd 2909, 2965 ¶155 (2011) (“Section 257 Triennial Report”). The Commission states: “we propose that Congress adopt a new tax incentive program that would authorize the provision of tax advantages to eligible companies involved in the sale of communications businesses to small firms, including those owned by women and minorities. The proposed program could permit deferral of the taxes on any capital gain involved in such a transaction, as long as that gain is reinvested in one or more qualifying communications businesses. The proposed program could also permit tax credits for sellers of communications properties who offer financing to small firms. Additional conditions might include restrictions on the size of the eligible purchasing firm, a minimum holding period for the purchased firm, and a cap on the total value of eligible transactions. The provision of tax advantages has proven to encourage the diversification of ownership and to provide opportunities for entry into the communications industry for small businesses, including disadvantaged businesses and businesses owned by minorities and women.” Id.

<sup>36</sup> See MMTC Sep. 7 Ex Parte Letter supra n. 13 at p. 1 (“An updated version of the policy could address previous concerns by being race neutral, encompassing media and telecom, and capping deal size and total program size.”)

<sup>37</sup> See Initial Comments of the Diversity and Competition Supporters In Response to The Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294 (July 30, 2008) at pp. 23-27 (citing Mullaney Engineering, Inc. Petition for Reconsideration and/or Comment, MM Docket No. 87-268, Oct. 26, 2007), available at <http://mmtconline.org/lp-pdf/DCS-Comments-Third-NPRM-073008.pdf> (last visited Mar. 29, 2012) (“DCS Third FNPRM Comments”).

<sup>38</sup> In 2007, Mullaney Engineering, Inc. submitted a proposal to reallocate TV Channels 5 and 6 to FM broadcasting. See Mullaney Engineering, Inc. Petition for Reconsideration and/or Comment, MM Docket No. 87-268 (Oct. 26, 2007); see also Comments of the Broadcast Maximization Committee, MB Docket No. 07-294 (July 30, 2008) (“BMC Comments”). Since this time, MMTC and the Broadcast Maximization Committee have endorsed and refined this proposal to encourage the FCC to use Channels 5 and 6 to save AM radio, expand noncommercial educational (NCE) service, and relocate much of the Low Power FM service. See MMTC Radio Rescue Petition, Review of the Technical Policies and Rules Presenting Obstacles to Implementation of Section 307(b) of the Communications Act and to the Promotion of Diversity and Localism, RM-11565, pp. 7-8 (July 19, 2009), available at <http://mmtconline.org/lp-pdf/MMTC-Radio-Rescue-Petition-071909-REV.pdf> (last visited Mar. 29, 2012) (“MMTC Radio Rescue Petition”). See also BMC Comments at p. 2. Specifically,



tremendous opportunity to eliminate interference and save AM radio.<sup>39</sup> These channels, if developed properly, could promote diversity by helping minority owned AM stations serve larger audiences.<sup>40</sup> Minority broadcasters were not allowed entry into the broadcast industry for more than two generations after the industry was born; it wasn't until 1956 that minorities first received a radio license.<sup>41</sup> As a result of this late entry, minorities were often only able to acquire stations with inferior technical parameters and exurban site locations.<sup>42</sup> We commend the Commission's actions to create a task force within the Diversity Committee to examine the issue and look forward to a resolution among all stakeholders.<sup>43</sup>

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BMC proposed that the FCC “(1) relocate the LPFM service to a portion of this spectrum band; (2) expand the NCE service into the adjacent portion of this band; and (3) provide for the conversion and migration of all AM stations into the remaining portion of the band over an extended period of time and with digital transmissions only.” Id.

<sup>39</sup> See MMTTC Radio Rescue Petition at 7.

<sup>40</sup> See id. at 9.

<sup>41</sup> See Comments of Civil Rights Organizations, Creation of a Low Power Radio Service. MM Docket No. 99-25 (Aug. 3, 1999) at 40 (citing Antionette Cook Bush and Marc S. Martin, The FCC's Minority Ownership Policies from Broadcasting to PCS, 48 Fed. Comm. L.J. 423, 439 (1996)).

<sup>42</sup> See Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association in Response to the Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 04-233 (Apr. 28, 2008) at p. 3, available at <http://mmtconline.org/lp-pdf/08-04-28-MMTC-ISBA-Localism-Cmts-042808.pdf> (last visited Mar. 29, 2012) (“2008 Localism Comments”) (“The vast majority of minority-owned stations are on the AM Band”).

<sup>43</sup> The Commission recently tasked the reconstituted the Diversity Committee to examine this issue. See Meeting of the Advisory Committee for Diversity in the Digital Age (Dec. 6, 2011), at 82:30-85:00, available at <http://www.fcc.gov/events/diversity-committee-meeting> (last visited Mar. 29, 2012). During the last Diversity Committee Meeting, the Office of Communications and Business Opportunities (“OCBO”) volunteered to help the Task Force clarify the issues and expectations of the Task Force and resulting recommendations. Diversity Committee Meeting (Mar. 14, 2012) at 56:45-59:45, available at <http://www.fcc.gov/events/diversity-committee-meeting-0> (last visited Mar. 29, 2012).



**5. Examine How To Promote Minority Ownership As An Integral Part Of All FCC General Media Rulemaking Proceedings; Examine Major Rulemaking And Merger Applications To Discern The Potential Impact Of The Proposed Rules Or Transactions On Minority And female Ownership; Consider Ownership Impact And Viewpoint Diversity As Part Of The Qualifications Of An Applicant, Without Comparing Applicant To Other Potential Applicants, For Assignment And Transfer Applications [Proposal 1].<sup>44</sup>**

This proposal, which dates back to 1973,<sup>45</sup> seeks to integrate civil rights into the FCC's institutional priorities, urging the Commission to consider the probable impact that each proceeding and transaction will have on minority ownership. This proposal contemplates that the Commission include a minority and female impact statement in all major rulemaking proceedings and transactions.<sup>46</sup> Through minority and female impact statements, the Commission could navigate the unintended consequences of major actions on its diversity goals, while crafting informed policy decisions.<sup>47</sup>

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<sup>44</sup> See DCS 2007 Initial Comments at pp. 29-30; see also 2007 DCS Supplemental *Ex Parte* Comments at p. 12; DCS Third FNPRM Comments at pp. 27-29; Recommendations on Spectrum and Access to Capital, New Technologies Subcommittee, Advisory Committee on Diversity for Communications in the Digital Age (June 14, 2004) at p. 3, available at [http://transition.fcc.gov/DiversityFAC/adopted-recommendations/spectrum\\_and\\_access.pdf](http://transition.fcc.gov/DiversityFAC/adopted-recommendations/spectrum_and_access.pdf) (last visited Mar. 29, 2012) (“Diversity Committee Recommendations on Spectrum and Access to Capital”).

<sup>45</sup> See DCS 2007 Initial Comments at pp. 29-30 (this rule was proposed by Citizens Communications Center in 1973 and advanced by NABOB).

<sup>46</sup> See *id.* See also DCS Third FNPRM Comments at pp. 27-28.

<sup>47</sup> See DCS 2007 Initial Comments at p. 30. DCS explained that, while an agency may adopt rules that have unintended negative consequences on minorities, the agency is encouraged to be aware of the impact that its actions will have on minorities. See *id.*; see also *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment). “School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so its unlikely that any of

**6. Designate A Commissioner To Oversee Access To Capital And Funding Acquisition Recommendations [Proposal 8].<sup>48</sup>**

To combat the dismal state of media financing, this proposal recommends that the FCC designate one Commissioner to oversee issues relating to increasing access to capital for small, minority, and women-owned businesses. DCS advises the Commission to implement the Commission's Federal Advisory Committee for Diversity in the Digital Age ("Diversity Committee") Proposal. The Diversity Committee reiterated that financing is difficult to come by in media transactions due to the economy, a dearth of sophisticated media lenders, and lenders' preference for large deals over small, minority, or women owned business transactions, and sought to solve this problem by designating a commissioner to shepherd recommendations to increase access to capital and funding sources.<sup>49</sup> The Commission has designated commissioners for other important policies.<sup>50</sup> The designated commissioner would gather and develop relevant materials to populate a portion of the FCC's website dedicated to these issues; conduct outreach to the private sector and inter-governmental agencies; initiate a review of major rulemakings and adjudications to assess the resulting impact on access to capital for small, minority, and women

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them would demand strict scrutiny to be found permissible.... Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly." *Id.* (internal citations omitted).

<sup>48</sup> See Recommendation of the Funding Acquisition Task Force, Media Issues Subcommittee, Advisory Committee for Diversity in the Digital Age (Dec. 3, 2009) at p. 6, available at <http://transition.fcc.gov/DiversityFAC/meeting120309.html>, then follow link to "Funding Acquisitions" (last visited Mar. 29, 2012) ("Funding Acquisitions Recommendation").

<sup>49</sup> See *id.* at pp. 1, 6.

<sup>50</sup> See, e.g., 47 C.F.R. §0.181 (the Defense Commissioner "directs the homeland security, national security and emergency preparedness, and defense activities of the Commission...").

owned businesses; and oversee potential legislative recommendations, such as reinstatement of a Tax Certificate program.<sup>51</sup>

**7. Create A Media And Telecom Public Engineer Position To Assist Small Businesses And Nonprofits With Routine Engineering Matters [Proposal 34].<sup>52</sup>**

By creating this valuable resource for small businesses and nonprofits, the Commission would increase diversity by reducing the cost burden associated with navigating the rule maze of regulatory compliance.

Small broadcasters, who often lack resources that larger stations take for granted, struggle to maintain the cost of compliance with the Commission's complicated regulatory system. The costs associated with this system create entry barriers for small businesses and nonprofits in the broadcast industry.<sup>53</sup> To alleviate this burden, the Commission should create a new staff resource, a position titled Broadcast Public Engineer, to assist small businesses and nonprofits with routine engineering matters. The Broadcast Public Engineer should act as the Commission's broadcast ombudsman by conducting public outreach to develop proposals that would streamline and clarify certain FCC applications and filing procedures, thereby benefiting small businesses and nonprofits as well as the entire broadcast industry.

The Broadcast Public Engineer would work collaboratively with communications consulting engineers and would not compete with them in any respect. He or she would specifically be charged with the following activities:

- Administering an engineering assistance hotline to assist small businesses and nonprofits to complete the engineering portions of routine applications;

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<sup>51</sup> See id.

<sup>52</sup> See MMTC Radio Rescue Petition at pp. 47-50.

<sup>53</sup> See id. at 44-47 (explaining the complex nature of the engineering regulations).

- Reviewing the FCC Forms and corresponding instructions to recommend modifications or additions for the purpose of clarifying and simplifying completion of the engineering portion of these forms;
- Educating small businesses and nonprofits about the FCC’s current radio rules and any changes to them;
- Developing user guides and brochures providing explanations regarding how to complete the engineering portions of FCC applications that are more detailed than the instructions to the forms; and
- Reviewing the FCC’s Consolodated Database System (CDBS) database to recommend ways to make the technical information memorialized in the database more easily accessible and comprehensible to the public.

Furthermore, the Broadcast Public Engineer could work with the Media Bureau’s engineering staff to identify frequently made engineering errors on broadcast applications and, through public outreach, reduce the incidence of such errors going forward.

The Commission’s Broadcast Public Engineer could be part of the Office of Communications and Business Opportunities (“OCBO”).<sup>54</sup> The OCBO “develops, coordinates, evaluates, and recommends to the Commission, policies, programs, and practices that promote participation by small entities, women, and minorities in the communications industry.”<sup>55</sup> The Broadcast Public Engineer’s responsibilities would be consistent with this mandate.

The addition of the Broadcast Public Engineer would ultimately provide significant efficiencies to the Commission by reducing the number of inadequately and inaccurately completed applications filed. Accordingly, the position of Broadcast Public Engineer would not only support the public interest by furthering the mission of the OCBO to remove barriers to participation by small entities, women, and minorities, but it may also improve the Commission’s processing of broadcast applications generally.

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<sup>54</sup> This Petition proposes a public engineer focused only on broadcasting. If the Commission grants this proposal, it may also want to add public engineer positions for other communications sectors subject to Commission regulation, particularly cable, wireline and wireless.

<sup>55</sup> 47 C.F.R. §0.101(b)(2).

This proposal is also consistent with President Obama's stated objective of making federal agencies more open and transparent. On his very first day in office, the President issued the Transparency Memorandum, which called on the heads of federal agencies to make government more transparent, participatory and collaborative.<sup>56</sup> By enacting this proposal, the Commission would be making great strides in fulfilling this administrative goal.

**8. Issue A One-Year Waiver, On A Case-By Case Basis, Of Application Fees For Small Businesses And Nonprofits [Proposal 35].<sup>57</sup>**

Allowing a one-year waiver on certain applications would increase diversity by providing struggling small and nonprofit stations the opportunity to offset the effects of the troubled economy. In an effort to financially assist nonprofits and small businesses<sup>58</sup> that either own or are acquiring radio stations, the Commission should allow fee waivers for the following applications:

- FCC Forms 175 (Application to Participate in an FCC Auction);
- FCC Form 301 (Application for Construction Permit for Commercial Broadcast Station);
- FCC Form 302-AM (Application for AM Broadcast Station License);
- FCC Form 302-FM (Application for FM Broadcast Station License);
- FCC Form 303 (Application for Renewal License for AM, FM, TV, Translator, or LPTV Station);

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<sup>56</sup> Memorandum for Heads of the Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009) ("Transparency Memorandum").

<sup>57</sup> See MMTC Radio Rescue Petition at pp. 50-52 (originally, this proposal contemplated a one-year blanket waiver of application fees, but upon further consideration we believe that the Commission can accomplish these goals through a waiver process).

<sup>58</sup> See id. The Commission could use the Small Business Administration's definition of a small business as set forth in 13 C.F.R §121 as a gating requirement for individualized access to the Public Engineer, or it may determine that further gating requirements are appropriate. The Commission could also choose to define nonprofits consistent with the definition set forth in 26 U.S.C. §501(c)(3). However, for proposals that apportion scarce resources, including FCC Licenses, the Commission should rely on the Overcoming Disadvantage Preference. See supra p. 2 at n. 7.

- FCC Form 323 (Ownership Report for Commercial Broadcast Station);
- FCC Form 340 (Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station);
- FCC Form 349 (Application for Authority to Construct or Make changes in a FM Translator, or FM Booster Station);
- FCC Form 350 (Application for an FM Translator or FM Translator or FM Booster Station License); and
- Application for Special Temporary Authority.

Pursuant to Section 158(d)(2) of the Communications Act and the Commission's Rules, the Commission has authority to waive application fees for "good cause" where such action would "promote the public interest."<sup>59</sup> Good cause exists here to help stations overcome barriers to access to capital while the radio industry recovers from a troubled economy and fluctuating advertising revenues.<sup>60</sup>

**9. Grant Eligible Entities A Rebuttable Presumption Of Eligibility For Waivers, Reductions, Or Deferrals Of Commission Fees [Proposal 5].<sup>61</sup>**

As the Commission develops an effective definition of eligible entities or implements the Overcoming Disadvantage Preference, the Commission should alleviate barriers to industry participation caused by economic hardship by providing a rebuttable presumption that these entities are eligible for fee waivers, reductions, or deferrals. This proposal, developed by the Commission's Diversity Committee, defines eligibility broadly and could also encompass a

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<sup>59</sup> See 47 U.S.C. §158(d)(2). See also 47 C.F.R. §§1.1119, 1.1166.

<sup>60</sup> See Radio Revenue Trends, available at <http://www.rab.com/public/pr/yearly.cfm> (last visited Mar. 29, 2012) (In 2007 Annual Revenue, in millions, for Network and Spot were \$1,153.0 and \$18,476.0 respectively, compared to 2011 numbers which were \$1,136.0 Network and \$14,060.0 Spot).

<sup>61</sup> See generally Recommendation on Application and Regulatory Fees, Access to Capital Subcommittee, Advisory Committee for Diversity in the Digital Age (Oct. 28, 2008), available at <http://transition.fcc.gov/DiversityFAC/102808/app-reg-fees-102808.pdf> (last visited Mar. 29, 2012) ("Diversity Committee Recommendation on Application and Regulatory Fees").

revised definition of eligible entities or the Overcoming Disadvantage Preference (“ODP”) standard.<sup>62</sup> The Commission should exercise its discretion when projecting fee amounts to reduce fees for eligible entities and issue waivers of deferrals of application and processing fees to promote the public interest.<sup>63</sup>

Section 158(d)(2) allows the Commission to “waive or defer ...[application fees] in any specific instance for good cause shown, where such action would promote the public interest.”<sup>64</sup> Section 159(d) is more permissive in granting the Commission authority to “waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest.”<sup>65</sup> Section 159(b) also grants the Commission flexibility when assessing fees to account for factors “that the Commission determines are necessary in the public interest”.<sup>66</sup>

The Commission’s regulations make it clear that waivers will only be considered on a case-by-case basis rather than for a class of applicants.<sup>67</sup> Further, the Commission’s regulations

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<sup>62</sup> See id. (“For the purpose of such new rules, an “eligible entity” could be defined as a socially or economically disadvantaged business (“SDB”), as an entity provided essential services to isolated populations, as an entity that incubates eligible entities, or as a small business that has individually faced and (where relevant) overcome disadvantages.”); see also DCS 2012 Initial Comments at 14-21.

<sup>63</sup> See Diversity Committee Recommendation on Application and Regulatory Fees at pp. 2-3 (discussing 47 U.S.C. §§158, 159). Section 158(d)(2) allows the Commission to “waive or defer ...[application fees] in any specific instance for good cause shown, where such action would promote the public interest.” 47 U.S.C. §158(d)(2). Section 159(d) is more permissive in granting the Commission authority to “waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest.” 47 U.S.C. §159(d).

<sup>64</sup> 47 U.S.C. §158(d)(2).

<sup>65</sup> 47 U.S.C. §159(d). See also 47 U.S.C. §158(d)(2) (discussing waivers of application fees “for good cause shown” that is in the public interest).

<sup>66</sup> See 47 U.S.C. §159(b)(1).

<sup>67</sup> See 47 C.F.R. §1.1119(b) (“Request for waivers or deferrals will only be considered when received from applicants acting in respect to their own applications. Request for waivers or deferrals of entire classes of services will not be considered.”) See also 47 C.F.R. §1.1166 (“The

specifically envision certain instances of financial hardship as qualifying for application or regulatory fee waivers.<sup>68</sup> However, neither the statutes nor the regulations limit the public interest standard to financial hardship.<sup>69</sup>

As proposed by the Diversity Committee, the Commission could increase regulatory efficiency, ease the financial burden for small businesses, and promote ownership diversity by “declaring that in a request for fee relief, an applicant may show that it is a member of a class of eligible entities that the Commission has determined to be entitled to a rebuttable presumption of eligibility for a waiver, reduction or deferral of the fee.”<sup>70</sup> The Commission should publish a Notice of Proposed Rulemaking tentatively concluding that eligible entities are entitled to a rebuttable presumption of eligibility for application and fee reductions, waivers, and deferrals.<sup>71</sup>

The NPRM could examine:

- The classifications of entities whose members would be rebuttably presumed eligible for individual fee relief;
- Which types of fees should be subject to relief;
- Whether fee relief should be offered in the form of waivers, or reductions, or deferrals;
- The aggregate extent to which fee waivers, reductions or deferrals could be offered without materially impairing the Commission’s ability to generate

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fees established by sections 1.1152 through 1.1156 may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. Request for waivers, reductions or deferrals of regulatory fees for entire categories of payors will not be considered.”).

<sup>68</sup> See 47 C.F.R. §§1.1119(f), 1.1166(e).

<sup>69</sup> See 47 U.S.C. §§158(d)(2), 159(d). See also 47 C.F.R. §§1.1119(c)-(d), 1.1166(c)-(d) (the Commission warns petitioners requesting waivers that the proper form and fees must be filed along with petition unless the petition is accompanied by a request for payment deferral due to documented financial hardship). Further, the public interest would be served by requiring broadcasters to have a plan for “designated hitters” to serve the entire population when a non-English speaking station loses service during or after an emergency.

<sup>70</sup> See Diversity Committee Recommendation on Application and Regulatory Fees at p. 4.

<sup>71</sup> See id. at p. 6.



financing for its own operations, inasmuch as the Commission's budget requirements may limit its flexibility in offering fee relief; and

- The amounts of reductions of specific fees, and the lengths of deferrals of specific fees, that would be appropriate.<sup>72</sup>

**10. Extend The Cable Procurement Rule To Broadcasting  
[Proposal 61].<sup>73</sup>**

This proposal highlights the importance of contracting opportunities to develop the experience and finances that could enable a contractor to transition into ownership.

For two decades, Congress has required cable operators to encourage the participation of minority and women entrepreneurs “with all parts of its operation” and analyze the results of their EEO programs.<sup>74</sup> To that end, the Commission's corresponding regulations envision “recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests.”<sup>75</sup>

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<sup>72</sup> Id. at pp. 6-7.

<sup>73</sup> See Recommendation on Procurement Issues, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (June 10, 2008), available at <http://transition.fcc.gov/DiversityFAC/061008/procurement-061008.pdf> (last visited Mar. 29, 2012) (“Diversity Committee Procurement Recommendation”) (recommending the Commission examine extending the procurement requirements to all platforms). Outside of the context of this proceeding, Proposal 61 contemplates extending all civil rights rules (EEO, transactional non-discrimination, advertising non-discrimination, procurement non-discrimination) to all platforms. See also e.g., MMTC Petition for Rulemaking to Expand the Commission's Broadcast Advertising Nondiscrimination Rule to Cable, Satellite and Telecommunications Services, PRM09MB (Feb. 16, 2009) at pp. 4-6, available at <http://mmtconline.org/lp-pdf/Advtg-Nondiscrimination-PFRM-021509.pdf> (last visited Mar. 29, 2012).

<sup>74</sup> See Diversity Committee Procurement Recommendation (citing 47 U.S.C. §554(d)(2)(E)-(F)). The Executive Branch has also demonstrated a significant interest in procurement nondiscrimination through Executive Order 13170, which mandates that each agency “shall aggressively seek to ensure substantial 8(a), SDB, and MBE participation in procurements for and related to information technology, including procurements in the telecommunications industry.” See Increasing Opportunity and Access for Disadvantaged Businesses, Executive Order 13170, 65 Fed. Reg. 60825, 60829 (Oct. 12, 2000).

<sup>75</sup> See 47 C.F.R. §76.75(e)(1).

The legislative history of the cable procurement nondiscrimination requirement illustrates Congressional intent to bolster minority participation throughout the communications industry. The Cable Communications Policy Act of 1984 required the Commission to create rules to “encourage minority and female entrepreneurs to conduct business with all parts of its operation; and analyze the results of its efforts to recruit, hire, promote and use the services.”<sup>76</sup> This requirement “reflects the Committee’s commitment to ensuring increased opportunities for women and minorities in all aspects of the telecommunications marketplace.”<sup>77</sup> As Congress prepared to address the state of the cable industry again in 1992,<sup>78</sup> it found that “[t]he Cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.”<sup>79</sup>

More than twenty years after the Cable Communications Policy Act and more than a decade after Congress found that consolidation in the cable industry created a market entry barrier for new entrants, the Diversity Committee found that “[t]ens of billions of dollars are spent annually by cable [...] and wireless carriers on capital expenditures – particularly engineering, furnishings, installations and construction, as well as programming and operating services. Disadvantaged businesses, including minority owned businesses, rarely are full partners in procurement.”<sup>80</sup> Upon making this observation, the Diversity Committee recommended that the Commission issue a notice of proposed rulemaking to examine: (1) the

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<sup>76</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2798 (1984) (codified at 47 U.S.C. §554(d)(2)(E)-(F)).

<sup>77</sup> H.R. REP. NO. 98-934 (1984) p. 87, available at <http://www.millervaneaton.com/00128762.pdf> (last visited Mar. 29, 2012).

<sup>78</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>79</sup> H.R. REP. 102-862 (1992).

<sup>80</sup> See Diversity Committee Procurement Recommendation.

Commission's authority to extend procurement requirements to broadcasting and other regulated industries; (2) the current state of potential contacting opportunities in all regulated platforms; (3) entry and inclusion barriers; (4) methods to ensure compliance; and (5) the requirement to "analyze the results of its efforts" found in 47 U.S.C. §554(d)(2)(F) and whether to require public reporting on minority and female procurement contracts.<sup>81</sup>

**11. Extend Grandfathering For One Year If The Cluster Or Noncompliant Station(s) Are Sold To A Small Business [Proposal 19].<sup>82</sup>**

This proposal seeks to provide small businesses with sufficient time to gain access to capital. In 2003, the Commission authorized the transfer intact of grandfathered station clusters if they are sold to small businesses;<sup>83</sup> however, because that policy failed to produce a single closed transaction, a later proposal urged the Commission to allow the sale of grandfathered radio clusters intact to any buyer, subject to a condition that the buyer file an application to transfer the excess stations to a small business buyer within 12 months after consummation of the cluster's purchase. DCS explained that this policy would redress the core problem with the existing rule: small businesses are less likely to have rapid access to sufficient capital during the short period of time when the broadcast station seller is soliciting bids. Under this approach, the larger entity could purchase the entire "above cap" cluster at the outset, and a small business would have the additional twelve month period, if necessary, to raise the capital to purchase the excess stations. The Commission agreed that the proposal "would promote small business

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<sup>81</sup> See id.

<sup>82</sup> See DCS 2007 Initial Comments at pp. 40-41. See also NPRM at ¶168 (questioning what to do with proposals that rely upon the vacated definition of eligible entities). See also MMTC Petition for Rulemaking To Facilitate the Entry of Small Businesses into Local Radio Markets (RM-11338) (July 12, 2007), available at <http://apps.fcc.gov/ecfs/document/view?id=6519610245> (last visited Mar. 29, 2012).

<sup>83</sup> See Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13810 ¶488 (2003) ("2002 Biennial Report").

investment in broadcasting by providing additional time and flexibility to raise the capital necessary to purchase the excess stations[,]”<sup>84</sup> and adopted the proposal.<sup>85</sup>

In the NPRM, the Commission questioned how to treat this proposal that relied upon the vacated eligible entities definition.<sup>86</sup> This proposal should not be abandoned because it relied upon the eligible entities definition; rather, the proposal should incorporate a newly developed definition or the Overcoming Disadvantages Preference.

## **12. Bifurcate Channels For Share-Times With SDBs [Proposal 21].<sup>87</sup>**

DCS urges the Commission to authorize “Free Speech Stations” dedicated to non-entertainment programming and owned by SDBs to share time with largely deregulated Entertainment Stations. Cluster owners would be incentivized to bifurcate channels through structural rule waivers.

This proposal was first offered in 2002 and endorsed by the Diversity Committee in 2004.<sup>88</sup> Free Speech Stations would be independently owned by SDBs, have at least 20 non-nighttime hours per week of airtime, and be primarily devoted to non-entertainment programming. A Free Speech Station would share time on the same channel with a largely deregulated “Entertainment Station.” A cluster owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could buy another fulltime station in the market by taking advantage of Section 202(b)(2) of the Telecommunications Act, which allows

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<sup>84</sup> See Diversity Order, 23 FCC Rcd at 5944-45 ¶61.

<sup>85</sup> See id.

<sup>86</sup> See NPRM at ¶168.

<sup>87</sup> See DCS 2007 Initial Comments at pp. 14-15. See also Comments of the Minority Media and Telecommunications Council, MM Docket No. 01-317 et al. (Mar. 21, 2002) at pp. 111-173; 2004 Recommendation on Incentive Based-Regulations at p. 7.

<sup>88</sup> See 2004 Recommendation on Incentive Based-Regulations at pp. 17-18; see also White Paper on Incentive-Based Regulations (May 23, 2004) at pp. 7-8, available at <http://transition.fcc.gov/DiversityFAC/meeting061404.html>, then follow link to Incentive-Based Recommendations (last visited Mar. 29, 2012) (“White Paper on Incentive Based-Regulations”).

for an exception to the local radio ownership rule when a new station is created.<sup>89</sup> That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a cluster could grow steadily up to the limits allowed by antitrust law.<sup>90</sup>

The desirability of this proposal stems from the fact that it directly ties the creation of a new radio station to the expansion of an existing cluster: thus, it is a classic “win-win” in which the creation of a viable new independent, diverse voice in a market would be a condition precedent to additional consolidation in the same market.

Reasonable people can disagree about what would constitute a sufficient opportunity for a new voice sufficient to justify additional consolidation. The Commission should determine the optimally tailored degree of equivalence between diversity and consolidation in a same-market context, and discern whether this share-time paradigm is attractive enough to generate applications from interested parties.

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<sup>89</sup> Section 202(b)(2) of the 1996 Telecommunications Act gives the Commission authority to allow an entity to own, operate or control more radio stations in a market than the number specified in 47 C.F.R. §73.3555(a) “if the Commission determines that such ownership, operation, control or interest will result in an increase in the number of radio broadcast stations in operation.” A new “radio broadcast station” is exactly what channel bifurcation creates, irrespective of its number of operating hours. See 47 C.F.R. §73.1715 (which authorizes commercial share-time operations with each entity sharing time denoted a “broadcast station.”) Since Section 202(b)(2) is not self-executing, the Commission recognized that it needed to conduct a rulemaking proceeding to implement the provision. See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996, Order, 11 FCC Rcd 12368, 12370 n. 2 (1996) (promising that “[t]he implementation of this particular provision will be addressed in a subsequent Notice of Proposed Rulemaking.”) No such proceeding was ever initiated however. Consequently, this docket can serve as the proceeding the Commission promised to undertake in order to implement Section 202(b)(2).

<sup>90</sup> The legal underpinning and operational elements of the proposal are set out in considerable detail in MMTC’s Comments in the 2002 Radio Ownership proceeding. See DCS 2003 Comments at pp. 106-07.

**13. Structural Rule Waivers For Financing Construction Of An SDB's Unbuilt Station [Proposal 22].<sup>91</sup>**

This proposal seeks to incentivize construction financing for an SDB's unbuilt stations by providing the broadcaster non-attributable, non-controlling EDP interest in the SDB's station and giving subsequent duopoly priority to the broadcaster that provides the financing.

This proposal was first presented in 1999 and envisions that a broadcaster financing construction of an SDB's unbuilt station would receive two benefits: (1) the broadcaster's noncontrolling EDP interest in the SDB would be deemed nonattributable, and (2) the broadcaster providing the financing would be reserved a place in line to subsequently duopolize or crossown another same-market station. This reserved place in the queue has significant value in markets where only a limited number of new combinations can be created under the local ownership rules.

As originally offered by MMTC, the proposal contemplated that:<sup>92</sup>

[W]hen a broadcaster provides an SDB with an equity/debt plus interest ("EDP Interest") that enables the SDB to build out an unbuilt permit, (1) the EDP Interest should be deemed nonattributable, and (2) the entity providing the EDP Interest (the "EDP Provider") should be reserved a place in line to subsequently duopolize or crossown another same-market station.

SDBs are often highly motivated to build out unbuilt television or radio permits and thereby add a new independent voice to the community. Larger, same-market competitors often lack this motivation because they typically prefer to duopolize or crossown stations that are already on the air.

SDBs wishing to build out (or acquire, then build out) an unbuilt permit could often benefit substantially from EDP Interests provided by a large broadcaster, especially one that understands the market. However, large broadcasters might hesitate to provide such an EDP Interest. It would be an attribution time bomb, set to explode once the unbuilt permit is built out. Furthermore, the EDP Interest, if attributable, could preclude the large broadcaster from acquiring another television station (or one or more radio stations) in the same market.

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<sup>91</sup> See DCS 2007 Initial Comments at pp. 15-17. See also DCS 2003 Comments at pp. 109-110.

<sup>92</sup> See MMTC, Petition for Partial Reconsideration and Clarification, MM Docket No. 91-1221 (filed Oct. 18, 1999) at pp. 17-18.

To resolve this dilemma, we propose that an EDP Interest be deemed nonattributable if it was provided to an SDB to build out, or acquire and build out, an unbuilt permit.

When the unbuilt station signs on, the number of independent local voices would increase by one, but might still be insufficient to make room for another duopoly or TV/radio crossownership. Anticipating that scenario, the Commission should also afford the EDP Provider a vested right to the processing of its applications to fill out its complement of duopolized or crossowned stations. This right would vest on the date the contract with the SDB is filed with the Commission. This vested right would provide the large broadcaster with the secure knowledge that its public spiritedness in making a potentially risky investment in an SDB's unbuilt permit will be rewarded with a guaranteed opportunity to acquire a full complement of local properties.

This EDP interest's nonattribution, coupled with a vested right to grow in the market, should powerfully incentivize companies to provide equity and debt to SDBs in a manner that promotes diversity.

In 2001, the Commission rejected this proposal because it had not yet had an opportunity to review five studies on market entry barriers that it had completed in 2000 (the "Section 257 Studies").<sup>93</sup> Six years later, the Diversity Order revised the EDP rules but did not include a provision for financing construction of an SDB's unbuilt station.<sup>94</sup> Thus this proposal is ripe for consideration.

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<sup>93</sup> See Review of the Commission's Rules Governing Television Broadcasting (Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001), reversed in part on other grounds sub nom. Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002), rehearing denied (Aug. 12, 2002) ("[w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission."); see also Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests, 16 FCC Rcd 1097, 1109-10 ¶¶23-24 (2001) (deferring EDP proposal until Adarand studies could be completed); see also Diversity Order, 23 FCC Rcd at 5933 ¶23, n. 57 (discussing MMTC's proposal and the deferral of the proposal).

<sup>94</sup> See Diversity Order, 23 FCC Rcd at 5936-37 ¶¶29- 34.

**14. Use The Share-Time Rule To Allow Broadcasters To Share Frequencies To Foster Ownership Of DTV And FM Subchannels [Proposal 24].<sup>95</sup>**

DCS urges the Commission to allow licensees the option to voluntarily assign a bundle of rights tantamount to ownership. This virtual ownership model would help new entrants, and multicultural and multilingual entrepreneurs, gain access to capital.

Industry leaders strongly favor widespread use of DTV and FM subchannels, but these assets often lie fallow because entrepreneurs wishing to offer diverse programming find it difficult to raise financing for a lease rather than ownership. Responding to this need, on September 27, 2007 the Diversity Committee recommended that the Commission issue a Notice of Proposed Rulemaking to implement a mechanism to allow FM radio or DTV licenses to allow part or full-time use of a part of their program feeds under the share-time rule.<sup>96</sup> DCS urges that the share-time rule be interpreted to contemplate the sharing of other elements of a broadcast license besides the element of time.

Through these voluntary assignments, new entrants would have the opportunity to serve local multicultural and multilingual audiences. Their programming could be supported by revenue derived from local multicultural and multilingual businesses seeking a narrowcast venue for advertising.

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<sup>95</sup> See DCS 2007 Initial Comments at pp. 41-47. But see Letter from Barbara A. Kreisman, Chief of the Video Division to ION Media Networks, Inc., RE: Applications for Assignment of Share-Time Licenses (Jan. 6, 2012) (recommending that departures from current rules should be taken up in another pending proceeding, Commission staff found that "... Section 73.1715 of our rules ... contemplates share-time operations that involve primarily a division of time, not a division of spectrum and assignment of a portion of the spectrum to a new license.")

<sup>96</sup> See Recommendation on Leasing or Ownership of FM or DTV Subchannels Under the Share-Time Rule, Subcommittee on Engineering Technology, Advisory Committee for Diversity in the Digital Age (Sept. 27, 2007) at p. 2, available at <http://transition.fcc.gov/DiversityFAC/meeting092707.html>, then follow link to "Subcommittee Proposals" (last visited Mar. 29, 2012).



To afford minorities and women a head start in accessing this spectrum, DCS proposes that the Commission initially limit the assignment of a DTV subchannel or HD channel to SDBs. As a further incentive to promote minority and women ownership, a broadcaster that assigns to an SDB a DTV subchannel or HD channel at a fraction of fair market value could be permitted to assign a second DTV subchannel or HD channel at fair market value. This model could exponentially increase minority ownership.<sup>97</sup>

The relationship between the DTV station and the subchannel owner, and between the FM station and the HD channel owner, would be somewhat analogous to the relationship between the owner of a condominium building and the owners of condominium units in the building. The DTV subchannel or HD channel licensee would control its channel's content, while its engineering would continue to be handled by the DTV or FM station licensee for a fee. In this paradigm, the DTV subchannel or HD channel licensee's control of its channel's programming is analogous to a residential condominium owner's enjoyment of his unit, while the DTV subchannel or HD channel's engineering is roughly analogous to the condominium building owner's management of the building's common areas. Just as the sale of a condominium building often occurs without the simultaneous sale of each unit and vice versa, the sale of the DTV station or FM station would not affect the package of rights being enjoyed by the DTV subchannel or HD channel licensee, and vice versa. If the main channel licensee

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<sup>97</sup> See DCS 2007 Initial Comments at p. 43 (citing S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States*, *Free Press* (June 2007) at p. 16; S. Derek Turner and Mark Cooper, *Out of the Picture: Minority and Female TV Station Ownership in the United States*, *Free Press* (Sept. 2006) at pp. 2, 12). "If just 20% of DTV or commercial FM broadcasters split off one channel each for sale under the share-time rule (*i.e.*, about 2,500 channels), minorities acquired 20% (about 500) of these channels and women also acquired 20% of these channels, then, applying Free Press' minority and women ownership figures (about 818 minority owned and 688 women owned stations), we would experience a 61% increase in minority ownership and a 73% increase in women's broadcast ownership. That would represent the greatest advance in ownership diversity since the quintupling in minority ownership from 1978 to 1995 that was largely brought about by the Tax Certificate Policy." DCS 2007 Initial Comments at p. 43.

loses its license, the subchannel licensee could continue to broadcast while the main channel would be assigned by a nonprofit entity in anticipation of being relicensed to a new entity.<sup>98</sup>

Share-times have been a common feature of broadcasting since the 1920s.<sup>99</sup> With the creation of the FCC, Congress continued to allow for restrictions on when licensees could broadcast.<sup>100</sup> The Commission later adopted the share-time rule, allowing licensees some flexibility in crafting share-time agreements.<sup>101</sup> The Commission's power to act in this manner has been confirmed by the Supreme Court.<sup>102</sup>

This new form of share-time is permissible because it would not trigger the competitive bidding rules under 47 U.S.C. §309(j). Adopted in 1992, Section 309(j) authorized the use of competitive bidding for mutually exclusive initial applications for a license or construction

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<sup>98</sup> Typically a broadcast station whose license has been revoked or non-renewed is operated by a nonprofit interim operator while a permanent licensee is selected. See, e.g. Lamar Life Broadcasting Co., 46 RR2d 1054, 1055 ¶3 (1979). Thus even if the DTV or FM station's license is revoked or non-renewed, the DTV subchannel or HD channel licensee could continue to operate.

<sup>99</sup> See City of New York v. FCC, 36 F.2d 115, 117 (D.C. Cir. 1929); see also Pacific Development Radio Co. v. FCC, 55 F.2d 540 (D.C. Cir. 1931) and Reading Broadcasting Co. v. FCC, 48 F.2d 458 (D.C. Cir. 1931) (discussing various challenges to share-time arrangements by radio licensees).

<sup>100</sup> See 47 U.S.C. §§303(c), 308(b).

<sup>101</sup> The share-time rule, 47 C.F.R. §73.1715, was codified in its present form in 1978, but it dates back two generations. See Main Auto Supply Co., 1 FCC 251 (1935). See also HATCO-60, 60 RR2d 1521, 1527 ¶17 (1986) (upholding broadcast licensees' right to determine and alter terms of share-time agreements); cf Westchester Council for Public Broadcasting, 8 FCC Rcd. 2213, 2214 ¶8 (1993) ("We note that, pursuant to Section 73.561, these efforts to negotiate should have been initiated prior to the filing of the application, so that either a share-time agreement, or a statement that no agreement could be reached, could have been filed with WCPB's application. Instead, WCPB chose to first file an application and then attempt to proceed with negotiations. Thus, we conclude that WCPB's actions were not consistent with Section 73.561.")

<sup>102</sup> See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390-91 (1969) ("[T]he Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.")

permit.<sup>103</sup> Congress intended the competitive bidding system, commonly referred to as auctions, to “encourage innovative ideas, and give the proper incentive to spur a new wave of products and services that will keep the United States in a competitive position.”<sup>104</sup> Congress felt that auctions would help “promot[e] efficient use of spectrum” and encourage “rapid deployment of new technology.”<sup>105</sup>

Congress found that the benefits of auctions included speeding the delivery of communications services and promoting “efficient and intensive use of the electromagnetic spectrum.”<sup>106</sup> Competitive bidding was intended strictly for initial license applications and was not to be permitted in situations where there was a single application for a license or in cases of license renewal or modification.<sup>107</sup> In implementing the competitive bidding system, Congress ordered the Commission to seek methods to “promote the development and rapid deployment of new technologies, products, and services for the benefit of the public ... without administrative or judicial delays.”<sup>108</sup>

Congress intended for the new regulations to “promote economic opportunity and competition” and stated that the Commission could achieve this goal by “disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women.”<sup>109</sup> Congress expected the Commission to adopt regulations that would “ensure that small businesses will continue to have opportunities to

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<sup>103</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993); see also H.R. REP. 103-111 (May 25, 1993).

<sup>104</sup> H.R. REP. 103-111.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

become Commission licensees...”<sup>110</sup> Congress anticipated that most of the licenses granted under section 309(j) would not be for broadcast services “where diversity in ownership contributes to diversity of viewpoints” but would be for services “where the race or gender of the licensee [would] not affect the delivery of service to the public.”<sup>111</sup> Congress encouraged the Commission to “continue to use of engineering solutions” and other methods “in order to avoid mutual exclusivity.”<sup>112</sup> This included tools such as “spectrum sharing arrangements” to be used “when feasible and appropriate.”<sup>113</sup>

Currently, share-time agreements are filed with the Commission and are considered part of the station license.<sup>114</sup> Thus, to share time on a current licensee’s spectrum, the other entity must become a licensee.<sup>115</sup> Section 310(d) authorizes a licensee to apply for transfer of a construction permit or station license.<sup>116</sup> The proposed transferor is reviewed just as if it were applying for its own station.<sup>117</sup> Such an application may state the hours of the day or other periods of time during which it plans to operate the station.<sup>118</sup> Section 309(j) applies to situations where there is more than one mutually exclusive applicant for a license, rather than situations where transfer of control to a single entity is proposed.<sup>119</sup> As noted above, Congress did not intend for the competitive bidding system to apply to situations where there was only one

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<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> 47 C.F.R. §73.1715(a).

<sup>115</sup> 47 C.F.R. §73.1715. The regulation consistently refers to “licensees,” implying that both parties to the agreement are already licensed by the Commission. Id.

<sup>116</sup> 47 U.S.C. §310(d).

<sup>117</sup> Id.; see also 47 U.S.C. §308(b).

<sup>118</sup> Id.

<sup>119</sup> See 47 U.S.C. §309(j)(1) (mandating competitive bidding for “mutually exclusive applications ... for any initial license or construction permit”).

application for a license.<sup>120</sup> This proposal does not contemplate a contest between mutually exclusive applicants seeking to operate on a subchannel; thus, its proposal can be implemented without triggering the 309(j) auction rules.

The applicability of the share-time rule has profound advantages on at least five levels:

First, it would promote ownership diversity by making it possible for new entrants, particularly minorities and women, to broadcast on perhaps hundreds of new stations under a model regarded by financial institutions as ownership rather than leasing.

Second, it would afford DTV and FM broadcasters an additional and entirely voluntary option for the use of their subchannels – the option being to monetize the subchannels with a share-time if (for example) they would prefer to receive cash for the asset rather than having to serve as a landlord for lessees or serve as a programmer if they do not have expertise in multichannel programming. In this way, financially struggling licensees could secure a financial rescue.

Third, by bringing new audiences and advertisers to over the air radio and television, these industries' asset values would increase and they would become more competitive.

Fourth, new multilingual and multicultural audiences could be served by over the air radio and television, thus accelerating consumer acceptance of DTV and HD radio receivers and programming.

Fifth, by expanding diversity of ownership and programming, it could someday become easier to justify additional relaxation of the local radio ownership rules.

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<sup>120</sup> H.R. REP. 103-111.

**15. Retention On Air Of AM Expanded Band Owners' Stations If One Of The Stations Is Sold To An SDB [Proposal 25].<sup>121</sup>**

This proposal, jointly submitted by eleven broadcasters and four citizen groups, would further the public interest by allowing AM broadcasters to continue to provide programming to their communities.

AM licensees operating in the Expanded Band and having another AM station paired with the Expanded Band station are required to forfeit one of these AM allotments for cancellation on the fifth anniversary of the date on which the Commission issued the Expanded Band authorization. In March 2006, eleven broadcasters and four public interest groups (the "Joint Petitioners") petitioned the Commission to waive this requirement in order to allow the transfer of one of the stations to a recognized small business, or the station's retention by the licensee if the licensee is a small business.

The Joint Petitioners contended that the benefit the Commission expected to realize from a licensee's returning its initial AM band authorization – reducing congestion and interference in the AM band – does not justify requiring Expanded Band stations to return one of their authorizations when doing so would deprive the listening public of service. Rather than having those licenses returned to the Commission, with the expectation that those stations would simply go silent, the Joint Petitioners requested that the Commission take the following actions:

- Temporarily waive the multiple ownership rule by extending the disposition required by Note 10 to Section 73.3555, 47 C.F.R. §73.3555, so that the exemptions to the multiple ownership rule established in Note 9 would not apply during the period when an AM licensee is permitted to hold both an Expanded Band AM license and paired in-band AM license;

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<sup>121</sup> See DCS 2007 Initial Comments at pp. 47-50. See also Entercom Kansas City License, LLC et al., Request for Waiver of Rules Requiring Return of AM Licenses, MM Docket No. 87-267 (Mar. 27, 2006), available at <http://apps.fcc.gov/ecfs/document/view?id=6518332697> (last visited Mar. 29, 2012)

- Modify the five-year disposition condition imposed on all expanded AM band stations for the same time period;
- Waive Section 73.1150(c), 47 C.F.R. §73.1150(c), so that prior to the extended disposition date, the licensee of an Expanded Band AM station could assign or transfer control of one of its stations to an entity qualifying as a “small business” as that term applies to radio broadcasters in the Small Business Administration’s regulations, 13 C.F.R. §121.201 (i.e., an entity having annual gross receipts under \$7 million).<sup>122</sup> Pursuant to this waiver:
  - The price for which a licensee could sell its authorization could not exceed 75% of the station’s fair market value, using a system comparable to that which exists under the Commission’s distress sale policy.<sup>123</sup> Further, the assignee or transferee would be subject to an anti-trafficking period of three years to ensure that the public interest benefits of the price discount enjoyed by the assignee or transferee will be enjoyed by the public for a substantial period of time.
  - After a station’s assignment or transfer, both the Expanded Band station and the original band station could operate throughout their license terms, with neither license having to be returned to the Commission following the transition period; and
  - Any licensee already qualifying as a “small business” (or attaining that status during the pre-divestiture year) would not need to dispose of its station at all, although if it sells one of the stations within the three year anti-trafficking period it would be expected to sell to another small business at a price not to exceed 75% of fair market value.
  - Reinstate AM band authorizations that have already been returned to the Commission in reliance on the existing policy, extending their disposition dates by one year.<sup>124</sup>

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<sup>122</sup> This definition of “small business” was applied in the 2002 Biennial Report, 18 FCC Rcd at 13810-12 ¶¶488-89 (making small businesses the eligible parties for purchasing radio clusters that must be broken up if sold).

<sup>123</sup> The distress sale policy was created in the Statement of Policy on Minority Ownership, 68 FCC2d 979, 983 (1978). See also Diversity Order, 23 FCC Rcd. at 5939 (modifying the policy under the eligible entity definition). In 1980, the Commission held that a distress sale price should not exceed 75% of fair market value. See Lee Broadcasting, 76 FCC2d 462 (1980); Idaho Broadcasting Consortium, 16 FCC Rcd. 21558, 21558 n. 4 (2001).

<sup>124</sup> Reinstatement of these facilities nunc pro tunc would ensure that broadcasters who quickly constructed facilities that were fully in compliance with Commission rules, and had to surrender their licenses because the five years had already elapsed before the AM Expanded Band Petition was filed, will not be penalized for having acted expeditiously. Licenses reinstated in this manner should be subject to the same interference requirements that would have applied had the licenses not been tendered for cancellation.

The primary benefit of this approach is that it would allow broadcasters to continue providing service to the public over existing AM stations, thereby furthering the Commission's long-held belief that any loss of service is prima facie inconsistent with the public interest, unless such loss is outweighed by other public interest considerations.<sup>125</sup> AM broadcasters operating in the Expanded Band provide valuable programming over their original band stations, in recognition of the loyalty some listeners feel to their "old" AM stations and the inability of some listeners to receive Expanded Band broadcasts. In addition, numerous AM broadcasters have specifically targeted the programming on their original band stations to serve the needs of minorities and other niche audiences, in a way that was impractical before AM stations had a second outlet for serving the market. Further, allowing an AM authorization held by an Expanded Band licensee to be sold to a small business entity would directly further the Commission's goal of promoting diversity of ownership by encouraging station ownership by small businesses and minorities.<sup>126</sup>

**16. Relax The Main Studio Rule [Proposal 30].<sup>127</sup>**

The Commission should allow a waiver of the main studio rule, particularly if there is a website to which the public has access. This type of waiver to the main studio rule would serve as a cost-efficient mechanism to promote minority ownership by reducing sunk costs that

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<sup>125</sup> See West Michigan Telecasters, Inc. v. FCC, 460 F.2d 883 (D.C. Cir. 1972); Coronado Communications Company, 8 FCC Rcd 159, 162 (1992) (citing Hall v. FCC, 237 F.2d 567 (D.C. Cir. 1956)).

<sup>126</sup> Interestingly, one of the Commission's original goals in creating the Expanded Band was to promote ownership diversity. See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, 78 FCC2d 1235, 1256 (1980) (Commissioner Brown, concurring, discussing the Commission's structural approach to new entrants and diversity through policies including the U.S. position at the 1979 WARC, resulting in the creation of the Expanded Band). Thus, a grant of this proposal would be consistent with the Commission's original intent when it developed the Expanded Band.

<sup>127</sup> See MMTTC Radio Rescue Petition at pp. 33-35.



disproportionately burden smaller broadcasters' balance sheets. This proposal would promote minority ownership and employment and would allow stations to move closer to their audiences.<sup>128</sup>

Prior to 1987, the Commission's rule required all broadcasters to maintain main studios in their communities of license. This rule was relaxed in 1987 and again in 1998.<sup>129</sup> The rule currently allows a station's main studio to be located either in "the station's community of license; [a]t any location within the principle community contour of any AM, FM, or TV broadcast station licensed to the station's community of license; or [w]ithin twenty-five miles from the reference coordinates of the center of its community of license..."<sup>130</sup> Licensees are also required to maintain a station's public inspection files at its main studio.<sup>131</sup>

The purpose of the rule is to ensure that a broadcast station's main studio is accessible to its community of license. This permits "community residents to readily contact the station to voice suggestions or complaints."<sup>132</sup> The benefit gained by stations through the implementation

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<sup>128</sup> Similar proposals were advanced by the FCC's Advisory Committee for Diversity in the Digital Age. See Recommendation on Diversifying Ownership in the Commercial FM Radio Band, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (Oct. 4, 2004) at p. 1; see also Recommendation on Diversifying Ownership in Terrestrial Radio, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (Dec. 10, 2007) at p. 1 (recommending that the Commission allow full power AM or FM radio stations to change their communities of license to any community within the same market, if the original community has no other full power AM or FM or LPFM station licensed to it and which originates local programming for at least 15% of its airtime).

<sup>129</sup> See Report on Broadcast Localism and Notice of Proposed Rule Making, 23 FCC Rcd 1324, 1343 ¶41 (rel. Jan. 24, 2008). "The main studio rule is rooted in Section 307(b) of the Communications Act." Id. Under the dictates of this section, the Commission must "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide for a fair, efficient, and equitable distribution of radio service to each of the same." Id. (citing 47 U.S.C. 307(b)).

<sup>130</sup> 47 C.F.R. §73.1125.

<sup>131</sup> 47 C.F.R. §73.3526(b).

<sup>132</sup> See Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations, Report and Order, 2 FCC Rcd 3215, 3217 ¶29 (1987).

of the main studio rule is “[e]xposure to daily community activities and other local media of communications helps stations identify community needs and interests, which is necessary to operate in today’s competitive marketplace and to meet our community service requirements.”<sup>133</sup>

The cost of maintaining and staffing main studios is a nearly fixed cost falling disproportionately on small operators, thus making it inherently more difficult for small operators to afford to program their stations competitively.

To promote both objectives of aiding minority and small business owners and advancing localism goals, the Commission could allow a waiver of the main studio rule. For example, the Commission could allow a station whose studio is not located within its contour or the 25-mile area to maintain its public file at the nearest library to the community of license,<sup>134</sup> host three town hall meetings a year in the community of license to hear from local citizens, and post the public file online.

A relaxation of the main studio rule would promote minority ownership and employment because it would generate savings that could be put to more productive use for the benefit of the community served by the station. The proposal would allow localism goals to be met in a cost-efficient manner, therefore providing increased opportunities for small, minority and women owned broadcasters to enter the field.

**17. Clarify That Eligible Entities Can Obtain 18 Months To Construct Major Modifications Of Authorized Facilities [Proposal 31].<sup>135</sup>**

In the NRPM, one of the measures relying upon the eligible entities definition that the Commission sought comment upon was the revision to the construction permit deadline.<sup>136</sup> As

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<sup>133</sup> Id. at 3218 ¶36.

<sup>134</sup> The Commission could indicate that when the nation attains universal broadband service, broadcast stations should be able to transition to all-electronic versions of their public files for access via the Internet.

<sup>135</sup> See MMTC Radio Rescue Petition at pp. 35-40.

mentioned in our Initial Comments, these proposals should not be abandoned.<sup>137</sup> However, to resolve confusion in the application of the rule, the Commission should clarify that the rule applies to major modification applications as well as new construction permit applications.<sup>138</sup>

Section 73.3598(a) of the Commission's rules states:

...each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations....<sup>139</sup>

The purpose of the inclusion of the eighteen-month extension for construction permits is to encourage sales of broadcast facilities to “eligible entities,” which are small, often minority owned businesses.<sup>140</sup> This proposal was introduced by DCS<sup>141</sup> and adopted in the Diversity Order.<sup>142</sup>

The language in 73.3598(a) bears an expansive reading of the meaning of “original construction permits.” On its face, the rule seems to apply to both “original construction permits” for new stations and “original construction permits...to make changes in...existing stations.” However, the Audio Services Division (“ASD”) has indicated that it will not apply the rule to major modification applications due to its narrow reading of the language in the Diversity

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<sup>136</sup> See NPRM at ¶168.

<sup>137</sup> See DCS 2012 Initial Comments at pp. 14-15, 19-21.

<sup>138</sup> See MMTTC Radio Rescue Petition at pp. 36-37.

<sup>139</sup> 47 C.F.R. §73.3598(a) (emphasis added). Section 73.3598(a) applied this language in the provision prior to the eighteen-month extension and subsequent to the extension. See Diversity Order, 23 FCC Rcd at 5963 Appx. A.

<sup>140</sup> See Diversity Order, 23 FCC Rcd at 5928 ¶10 (“This revision is intended to foster diversity of ownership by providing eligible entities with additional market entry opportunities.”)

<sup>141</sup> See DCS 2007 Initial Comments at pp. at 9-11.

<sup>142</sup> See Diversity Order, 23 FCC Rcd at 5930 ¶¶14-15.

Order and §73.3598 of the Rules.<sup>143</sup> Under ASD's reading, the rule only applies to new construction permit applications and not to modification applications.

The barriers created by not applying the eighteen-month extension to modification permits are severe. In many cases, a station is essentially valueless without the capability to upgrade by changing to a non-adjacent frequency, and the task of building out station modifications is an arduous and time-consuming challenge. AM stations often present the primary point of entry into broadcasting for minorities,<sup>144</sup> and AM station modifications are especially difficult. AM modifications often require highly complex multiple tower arrays and large parcels of land, usable only after time-consuming, hard-to-secure local zoning and building approvals are awarded. An eighteen-month extension can therefore be critical to the preservation of the major modification construction permit.

Narrowing of the amendment's scope to exclude these upgrade permits is inconsistent with the core purpose of the Diversity Order. To deny these extensions to broadcasters attempting to upgrade by major modifications would serve no perceptible public interest purpose.

The Commission should clarify that in adopting the rule, it intended, and it still intends, that the eighteen-month extension for new construction permits sold to eligible entities applies to construction permits for major modification permits,<sup>145</sup> and that the purpose of Section 73.3598(a) would be best served by granting the extension for new permits and major modifications.

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<sup>143</sup> See id.; see also 47 C.F.R. §73.3598.

<sup>144</sup> See 2008 Localism Comments at p. 3. ("The vast majority of minority-owned stations are on the AM Band").

<sup>145</sup> See Diversity Order, 23 FCC Rcd at 5930 ¶15.

This clarification should be adopted because the rule does not distinguish the eighteen-month extension on the basis of original permits or changes in existing stations.<sup>146</sup> The eighteen-month extension amendment should apply to all construction permits, including both initial and modification of original permits because when Section 73.3598(a) was amended to include the eighteen-month extension, the language pertaining to changes in existing stations was carried over from the rule into the amended version. This demonstrates the Commission's intent to have the extension apply, not only to initial permits but also to modification permits. Further, even if this does not plainly show intent to include modification permits in the eighteen-month extension, an "original construction permit" could just as logically include a modification of the original permit that has not previously been extended or tolled, rather than just the initial permit for a new station.

Additional confirmation of the Commission's intent to apply the eighteen-month extension to modification permits is found in each amendment of the rule. Each time the Commission changed the term of the construction period for permits in the past - 1970, 1985, and 1998 – it applied the identical changed term to both initial construction permits and major modification of license permits.<sup>147</sup>

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<sup>146</sup> The rule does not read "each original construction permit...or [construction permit] to make changes in such existing stations". See 47 C.F.R. §73.3598(a) (emphasis added). Thus, "original" permits are not distinguished from permits to "make changes in existing stations."

<sup>147</sup> See Amendment of Section 1.598 of the Commission's Rules to Provide A Revised Period for Construction for Various Broadcast Stations, 23 FCC 2d 274 (1970); see also Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, 102 FCC2d 1054, 1056 ¶7 (1985). See also 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 13 FCC Rcd 23056, 23090 ¶¶83-53 (1998) ("[T]he lengthened three year construction period will also apply to modification of licensed facilities. Likewise, the grounds for tolling a construction period will apply to modifications of licensed facilities.")

The eighteen-month extension would encourage sales of stations undergoing such major changes to disadvantaged businesses and new entrants. Thus through the extension of the major change construction permit, broadcasters would have an opportunity to take advantage of the increased coverage area and service to underserved communities.

Allowing an eighteen-month extension for modification applications would allow a station the flexibility to upgrade by making major changes that could increase the coverage area and population of the station and allow it to serve a much larger minority audience.<sup>148</sup> The eighteen-month extension would also serve the purpose of the Diversity Order by “foster[ing] diversity of ownership by providing eligible entities with additional market entry opportunities.”<sup>149</sup>

**18. Extend The Three-Year Period For New Station Construction Permits For Eligible Entities And SDBs [Proposal 32].<sup>150</sup>**

To alleviate economic hardship for small, minority, and women owned broadcasters, the Commission should adopt a blanket one-year extension of the construction permit deadline for broadcasters that are unable to take advantage of the 18-month construction permit extension.

This proposal would assist small, minority and women owned broadcasters by allowing them sufficient time to secure financing and build broadcast facilities. Broadcasters who are unable to take advantage of the eighteen-month extension could have a blanket one-year

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<sup>148</sup> MMTC and others have cited the need to help minorities upgrade existing stations to better serve their target audiences. See generally Comments of the Minority Media and Telecommunications Council, Revision of Procedures Governing Amendments to FM Table of Allotments And Changes of Community License In the Radio Broadcast Services, MB Docket No. 05-210 (filed Oct. 3, 2005) at pp. 5-11, available at <http://apps.fcc.gov/ecfs/document/view?id=6518165583> (last visited Mar. 29, 2012)..

<sup>149</sup> See Diversity Order, 23 FCC Rcd at 5928 ¶10.

<sup>150</sup> See MMTC Radio Rescue Petition at pp. 40-41.

extension of the three-year construction deadline found in Section 73.3598(a).<sup>151</sup> This extension would alleviate some the pressure on broadcasters caused by the troubled economy and assist small, women, and minority ownership and new entrants.

Many groups of entrepreneurs contend with several financial challenges that present difficulties when trying to start their businesses. For example, minority owned businesses are more likely to be denied financing, and “have less than half the average amount of recent equity investments and loans than non-minority firms even among firms with \$500,000 or more in annual gross receipts, and [minority firms] also invest substantially less capital at startup and in the first few years of existence than non-minority firms.”<sup>152</sup> The lack of access to capital remains the greatest barrier of entry to minorities and females desiring to make a footprint in the broadcast industry<sup>153</sup> and these broadcasters “generally have fewer financial resources.”<sup>154</sup> Furthermore, construction of many new and modified facilities appears to have become

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<sup>151</sup> 47 C.F.R. §73.3598(a). “...each original construction permit for the construction of a new TV, AM, FM or International Broadcast...or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and an application for license filed. Except...[a]n eligible entity that acquires an issued and outstanding construction permit for stations in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer.” *Id.*; see also *supra* at p. 38 (discussing the proposal to clarify that eligible entities can obtain 18 months to construct major modifications of authorized facilities).

<sup>152</sup> See Robert W. Fairlie, Ph.D., Disparities in Capital Access Between Minority and Non-Minority Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs, U.S. Department of Commerce, Minority Business Development Agency at p. 3 (Jan. 2010), available at <http://people.ucsc.edu/~rfairlie/presentations/Disparities%20in%20Capital%20Access%20Report%202010.pdf> (last visited Mar. 29, 2012).

<sup>153</sup> See United States Government Accountability Office, Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess (Mar. 2008) at p. 5, available at <http://www.gao.gov/assets/280/273671.pdf> (last visited Mar. 29, 2012) (“GAO Media Ownership Report”).

<sup>154</sup> See *id.* at p. 25.

increasingly difficult to complete due to the near shutdown of financing available to broadcasters. The credit crunch, which brought the American economy to its knees, has hit the broadcast industry particularly hard.<sup>155</sup> The situation appears even more serious for minority broadcasters, who contend their businesses have been on the brink of eradication because of the credit crunch.<sup>156</sup>

Further obstacles prevent timely construction. Tower rental costs continue to rise and the erection of new towers is a daunting challenge due to saturation of communications tower sites and increasing resistance to new construction. New land use, zoning and environmental restrictions and new governmental bodies regulating construction are problems at the federal, state and local levels.<sup>157</sup>

The Commission's concerns expressed in the past about warehousing of spectrum pale by comparison to the state of diverse broadcast ownership.

#### **19. Create Medium-Powered FM Stations [Proposal 36].<sup>158</sup>**

This proposal would expand FM service by creating modest-sized stations covering all of small markets – a key target for minority new entrants seeking to provide competitive coverage

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<sup>155</sup> See, e.g., There's Still Hope in the Broadcast Economy, TV Technology (Oct. 9, 2008), available at <http://www.tvtechnology.com/article/theres-still-hope-in-the-broadcast-economy/199740> (last visited Mar. 29, 2012) (describing problems experienced by the broadcast industry because of the economic downturn and credit crunch).

<sup>156</sup> See Fawn Johnson, Minority Broadcasters Seek Federal Aid, Wall Street Journal (Jan. 13, 2009), available at <http://online.wsj.com/article/SB124752187967935029.html> (last visited Mar. 29, 2012).

<sup>157</sup> See generally Erwin Krasnow, Henry Solomon, Communications Towers, Increased Demand Coupled With Increased Regulation, 18 Media Law & Policy 45 (2008) (discussing demand, cost, and regulatory issues involved with tower locations).

<sup>158</sup> See Recommendation on Diversifying Ownership in the Commercial FM Radio Band, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (Oct. 4, 2004) ("Commercial FM Radio Band Recommendation"), available at <http://transition.fcc.gov/DiversityFAC/adopted-recommendations/AdoptedFMRadioRules.pdf> (last visited Mar. 29, 2012).



with limited access to capital. Many of these stations would be natural additions to the AM-only facilities disproportionately owned by minority broadcasters.

The Diversity Committee explained how this proposal could increase spectrum efficiency by creating two new Medium Power FM (MPFM) classes of stations in Class A1: 1,500 watts at 100 meters HAAT and Class A2: 1,000 watts at 50 meters HAAT.<sup>159</sup> These MPFM stations would be less powerful than a Class A facility but more powerful than LPFMs and would be designed to fill the void in niche markets and small to medium markets where Class A facilities are not needed to serve the entire public.<sup>160</sup>

The Diversity Committee explained that

MPFM stations would be subject to the same interference criteria as full power stations and they would be regulated like full power stations.... The process of licensing MPFM stations could be tailored so as to provide points of entry for small entrepreneurs. For example, the Commission should consider using eligibility criteria to directly promote ownership by socially and economically disadvantaged businesses.<sup>161</sup>

The Commission could begin to implement this recommendation by conducting a cost-benefit analysis to determine where these MPFMs could fit in the FM Table.<sup>162</sup>

## **20. Authorize Interference Agreements [Proposal 38].<sup>163</sup>**

This proposal would promote minority ownership by allowing smaller, struggling stations to monetize spectrum they don't need in order to serve their core audiences. This proposal, offered by the Diversity Committee, urges the Commission to reconsider its policy against

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<sup>159</sup> See Diversity Committee White Paper on FM Radio (Oct. 4, 2004) at pp. 8-9, available at <http://transition.fcc.gov/DiversityFAC/meeting100404.html>, then follow link "FM Radio Rules" (last visited Mar. 29, 2012) ("White Paper on FM Radio Rules").

<sup>160</sup> See *id.*

<sup>161</sup> *Id.* (citing Clear Channel Broadcasting in the AM Radio Band, 78 FCC2d 1345, 1368-69 (1980)).

<sup>162</sup> See *id.*

<sup>163</sup> See Commercial FM Radio Band Recommendation.

allowing radio licensees to create negotiated interference agreements.<sup>164</sup>

The Commission has articulated its long-standing policy against allowing interference agreements in FM radio.<sup>165</sup> While the Diversity Committee articulated its understanding of the policy, “that an interference agreement might cause those living in between two stations to lose service -- based not on a Commission determination of their needs, but rather on the private economic choices of two licensees[,]”<sup>166</sup> the Diversity Committee maintained that the public would not be harmed by allowing interference agreements because 1) the Commission could intervene when the agreement was proposed, 2) the agreement would provide the party losing coverage compensation that could enable them to improve the station, and 3) a loophole exists in the ban that would allow a licensee to purchase a distant station and move it out to allow the initial station to increase power or move closer to its intended audience.<sup>167</sup>

Interference agreements would allow diverse broadcasters to move their facilities closer to their target audience.<sup>168</sup> The Diversity Committee believed that interference agreements could be especially valuable to enable competition when negotiated between two small broadcasters in

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<sup>164</sup> See White Paper on FM Radio Rules at p. 17. The Commission has allowed these agreements for certain TV stations. See, e.g., 47 C.F.R. §73.6022 (“Notwithstanding the technical criteria in this subpart, ... Class A TV stations may negotiate agreements with parties of authorized and proposed analog TV, DTV, LPTV, TV translator, Class A TV stations or other affected parties to resolve interference concerns; provided, however, other relevant requirements are met with respect to the parties to the agreement. A written and signed agreement must be submitted with each application or other request for action by the Commission. Negotiated agreements under this paragraph can include the exchange of money or other considerations from one entity to another. Applications submitted pursuant to the provisions of this paragraph will be granted only if the Commission finds that such action is consistent with the public interest.”)

<sup>165</sup> See 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rulemaking and Order, MM Docket No. 98-93, 13 FCC Rcd 14849, 14853-54 ¶7 (1998) (stating that the “Commission has generally rejected attempts by applicants to negotiate interference levels on a case-by-case basis, holding that the selection of interference standards is a non-delegable Commission responsibility.”)

<sup>166</sup> White Paper on FM Radio Rules at p. 17.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* at p. 18.

similar bargaining positions or in instances where one of the broadcasters is not using the maximum permissible interference protection.<sup>169</sup> The Commission could initially limit authorizing interference agreements to these circumstances “where the two broadcasters are small or where one of them is not fully utilizing its interference protection.”<sup>170</sup>

**21. Harmonize Regional Interference Protection Standards; Allow FM Applicants To Specify Class C, CO, C1, C2 And C3 Facilities In Zones I And IA [Proposal 39].<sup>171</sup>**

This proposal would promote diversity by increasing spectrum efficiency, reducing spectrum warehousing, and allowing lower class stations to upgrade.

Allowing FM stations to specify Class C, CO, C1, C2 and C3 facilities in Zones I and IA would reduce spectrum warehousing in Class B areas and allow lower class stations to upgrade. This proposal would also increase spectrum efficiency by extending the application of proven Zone II protections.

The current rules governing FM authorized power are cumbersome and difficult to navigate for stations seeking to improve their services. FM stations have limited ability to specify desired classes. Only “Class A, B1 and B stations may be authorized in Zones I and I-A. Class A, C3, C2, C1, C0 and C stations may [only] be authorized in Zone II.”<sup>172</sup>

To promote efficiency and improvement of service, the Commission should allow applicants for existing FM stations and new allotments to specify Class C, C0, C1, C2 and C3

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<sup>169</sup> See id.

<sup>170</sup> Id.

<sup>171</sup> See MMTC Radio Rescue Petition at pp. 20-22; see also Commercial FM Radio Band Recommendation. In 2004, the Diversity Committee recommended that the Commission harmonize regional interference protection standards. In crafting this recommendation, the Committee noted “[t]he regional zones distinguishing the Class B and B1 allotments from Class C2 and C3 allotments are a very inexact proxy for interference patterns typically, but not universally found in the respective regions. The Commission’s computing power is now more than adequate to permit it to dispense with zones and calculate actual interference likely to exist between pairs of stations.” See White Paper on FM Radio Rules at pp. 13-14.

<sup>172</sup> 47 C.F.R. §73.210.

facilities in Zones I and IA (i.e., anywhere in the U.S.) rather than in Zone II exclusively. Such Class C stations would receive protection to their ‘C’ protected contours (60 dBu) rather than the 54 dBu (Class B) and 57 dBu (Class B1) contours that would otherwise apply in those zones. Stations’ “interfering contours” would likewise be based on Class C standards. Such proposals must work within the existing spacing rules as provided in Sections 73.207, 73.215 or 73.213.<sup>173</sup> Stations opting to retain Class B status would continue to be protected with respect to their existing contour protections unless they change their class, including a change to a Class C station.

This proposal would promote diversity by reducing spectrum warehousing and increasing spectrum efficiency. Allowing stations to specify class C, C0, C1, C2 and C3 facilities in Zones I and IA would reduce “spectrum warehousing” in the crowded northeast and other class B areas, enabling class C stations, which could fit in full compliance with current interference and spacing rules, to upgrade, move closer to areas needing service, and in some cases even make room for new full power aural services. This change would increase spectrum efficiency because the lesser protection distances and ratios proven to work in Zone II could then apply in other zones.

## **22. Relax The Limit Of Four Contingent Applications [Proposal 41].<sup>174</sup>**

By gradually relaxing the limit of four contingent applications, the Commission could increase spectrum efficiency, encourage diverse participation, and conserve Commission resources through application fees and outsourced engineering analysis.

In 2006, the Commission significantly streamlined its procedures for proposing community of license changes for existing AM and FM stations.<sup>175</sup> Previously, an FM station in

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<sup>173</sup> 47 C.F.R. §§73.207, 73.215 and 73.213.

<sup>174</sup> See MMTC Radio Rescue Petition at pp. 28-33.

the non-reserved portion of the FM band had to initiate a rulemaking proceeding in order to change its community of license.<sup>176</sup> Such rulemaking proposals were subject to counterproposals, which often took many months, if not years, to resolve.<sup>177</sup> Once the FM station's community of license was changed by rulemaking, the licensee would have to file a minor change construction permit application in order to implement the community change.<sup>178</sup> AM stations and reserved band noncommercial educational ("NCE") FM stations would have to wait for a rare application filing window and file a major change application, which could be subject to conflicting applications.<sup>179</sup> The FM Amendments Report and Order made changes of community of license for AM commercial full-power and FM commercial and NCE broadcast stations a minor modification to be accomplished on a first come-first served minor modification application, subject to certain procedural requirements.<sup>180</sup>

DCS supports the streamlining of the community change process.<sup>181</sup> Replacement of the cumbersome rulemaking and major change application processes promised to better enable minority, female and small business broadcasters to improve their facilities and better serve their

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<sup>175</sup> See Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, 21 FCC Rcd 14212, 14213 ¶1 (2006) ("FM Amendments Report and Order").

<sup>176</sup> See id. at 14213 ¶4.

<sup>177</sup> See id. at ¶¶4, 9.

<sup>178</sup> See id. at ¶4.

<sup>179</sup> See id. at 14221 ¶13 ("...NCE FM licensees in the reserved band must wait for an NCE filing window before applying to change communities..."). See also Comments of the Minority Media and Telecommunications Council, Revision of Procedures Governing Amendments to FM Table of Allotments And Changes of Community License in the Radio Broadcast Services, MB Docket No. 05-210 (filed Oct. 3, 2005) ("MMTC FM Allotments Comments"). "Processing times for FM allotment changes currently run for several years and AM filing windows occur infrequently." Id. at 8.

<sup>180</sup> See FM Amendments Report and Order, 21 FCC Rcd at 14217 ¶9.

<sup>181</sup> See id. at 14215 ¶6. See also MMTC FM Allotments Comments, at p. 8.

audiences.<sup>182</sup> It also promised to create the first new signals in major metropolitan areas in many years and add much needed diversity to over-consolidated radio markets.<sup>183</sup>

One flaw in the FM Amendments Report and Order, however, subjected community change applications to a limit of four contingent FM minor modification applications found in Section 73.3517(e).<sup>184</sup> Under the prior rulemaking procedure for FM community of changes, there was no limit on the number of stations that could be relocated to a new frequency to permit a station to change its community of license.<sup>185</sup> Due to the spectrum congestion in and around most major metropolitan areas, where many minority broadcasters are located or where their intended audiences are located, community change proposals in or near such metropolitan areas often require the involvement of more than four stations.<sup>186</sup> Accordingly, a group of broadcasters and MMTC sought reconsideration of the limit of four.<sup>187</sup> The petitions for reconsideration remain pending.

The continued imposition of the limit of four threatens to prevent the broadcast industry and the public from realizing the full benefits of the FM Amendments Report and Order. The limit of four acts as an artificial barrier, with no substantive justification, to more efficient use of the spectrum where it is needed most, i.e., in and around major metropolitan areas.

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<sup>182</sup> See MMTC FM Allotments Comments, at p. 9.

<sup>183</sup> See id. at 11 (“...the new procedures will provide small and minority-owned businesses with greater opportunities to move into and serve the urban markets where their target audiences reside, resulting in larger audiences and the availability of more diverse programming”).

<sup>184</sup> See FM Amendments Report and Order, 21 FCC Rcd at 14217 ¶9. See also 47 C.F.R. §73.3517(e).

<sup>185</sup> See, inter alia, American Media Services, LLC, Mattox Broadcasting, Inc. and MMTC, Petition for Partial Reconsideration, Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcasting Services, MB Docket 05-210 (Jan. 19, 2007) at pp. 1-3 ¶¶2-6 (discussing origins of limit of four).

<sup>186</sup> See id. at p. 12 ¶¶24-26.

<sup>187</sup> Id.

The Commission should gradually relax the limit of four in order to bring some relief now and enable the Commission to gain experience with a larger number of applications involved in community change proposals. DCS urges the Commission to increase the limit on the number of contingent applications to be filed in connection with a community of license change proposal to ten applications for the first two years. After two years, provided that the Commission does not experience substantial hardship in processing applications within the limit of ten, the limit should be increased to twenty applications. These changes are fully consistent with the requirement found in Section 307(b), to distribute frequencies in a fair, efficient and equitable manner, “insofar as there is demand for the same.”<sup>188</sup>

An additional filing fee, beyond the one currently imposed on contingent applications, could be required for community change proposals that include more than six applications.<sup>189</sup> The surcharge could, perhaps, be pegged to the community change/upgrade rulemaking filing fee, which is imposed on rulemakings that result in a new community of license or an upgrade to a higher class channel.<sup>190</sup> The surcharge would help recover any added costs associated with the Commission processing these complex community change proposals and would also ensure that only the most compelling proposals are proffered to the Commission.

DCS also urges the Commission to authorize outsourcing of the Commission’s independent engineering analysis to disinterested contractors chosen by the Commission, in its sole discretion, and compensated by the applicants at rates specified by the Commission, if Commission staff has not been able to process applications within six months of their filing. This proposal should alleviate concerns that the Commission’s resources will be overtaxed by

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<sup>188</sup> 47 U.S.C. §307(b).

<sup>189</sup> See Amendment of the Schedule of Application Fees Set Forth In Sections 1.1102 through 1.1109 of the Commission’s Rules, Order, 23 FCC Rcd 14192, 14217-14224 (2008).

<sup>190</sup> See id. (approving increase of this fee to \$2,595.00 in the new fee schedule).

more complex community change proposals while helping to expedite the public interest benefits contained in these proposals.

The gradual relaxation of the limit of four would facilitate significant improvements in the arrangements of allotments in and around major metropolitan areas, thus creating new opportunities for minority, women, and small business broadcasters. With every station move or improvement, new opportunities for more efficient use of the FM spectrum will be created in the more rural and ex-urban areas.

**23. Request The Removal Of AM Nighttime Coverage Rules From Section 73.21(i) [Proposal 48].<sup>191</sup>**

Removing this rule would improve service and reduce operating costs because the AM nighttime coverage rule burdens AM stations, makes it difficult to improve daytime coverage, and serves as a barrier to entry due to the substantial compliance required for new site applications.

The nighttime coverage rule for AM stations requires, *inter alia*, that “for all stations, the daytime 5 mV/m contour encompasses the entire principal community to be served. That, for stations in the 535-1605 kHz band, 80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher”<sup>192</sup> (the “nighttime coverage” rule). The Commission allowed for some flexibility when it clarified how to attain substantial compliance with the nighttime coverage rule. Substantial compliance is achieved by showing either 80% coverage of the “area” or 80% of the

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<sup>191</sup> See MMTC Radio Rescue Petition at pp. 10-14.

<sup>192</sup> 47 C.F.R. §73.24(i). “That for all stations, the daytime 5 mV/m contour encompasses the entire principal community to be served. That, for stations in the 535-1605 kHz band, 80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That for stations in the 1605-1705 kHz band, 50% of the principal community is encompassed by the 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That, Class D stations with nighttime authorizations need not demonstrate such coverage during nighttime operation.” *Id.*



“population” within the political boundaries of the community of license.<sup>193</sup> In addition, the FCC will waive these requirements such that a new site may comply with pre-annexation boundaries as opposed to requiring coverage of the entire community including its newly annexed areas.<sup>194</sup> Nevertheless, it is still possible that the Commission may find that the annexed areas must be served upon finding that significant future development is likely.<sup>195</sup> The effect of the nighttime coverage rule is to unduly burden AM stations, thereby hampering their ability to improve daytime coverage. Even in cases where the applicant wishes to use only one site, the site must comply with both the daytime and nighttime coverage requirements. The ability to increase daytime coverage while using the same site is limited by the physics of nighttime propagation and protection requirements. The hardships imposed on AM stations as a result of the nighttime coverage rule can be exacerbated by a station’s loss of its AM antenna site, change in community boundaries, and/or situations in which a station cannot initially demonstrate substantial compliance at the application stage.

When an existing AM station loses its antenna site, it may become increasingly difficult or impossible for that station to comply with the nighttime coverage rule. For example, if an old site originally located within a particular community becomes overrun by development with higher land valuations, this development and the rising associated land costs would make site relocation to an outer, less-developed area imperative because AM station ground systems require large parcels of land. However, moving to less developed areas may mean that 80%

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<sup>193</sup> Pamplin Broadcasting, Inc., 23 FCC Rcd 649, 652 (2008).

<sup>194</sup> Bay City Communications Corp., 83 FCC2d 210, 212 (1980).

<sup>195</sup> See Broadcasting, Inc., 20 FCC2d 713, 718 (1969) (where the percentages of population deviation were minimal “absent a finding of significant future growth”). The Commission also reviews whether the areas excluded from coverage do not contain urbanized residential areas, such as in New England towns, where township boundaries bear little resemblance to urbanized areas. See Andy Valley Broadcasting System, Inc., 12 FCC2d 3, 4 (1968).

coverage of the community of license at night is not possible, even though the daytime 5 mV/m contour would encompass the entire community of license from the same location.

Changes in community boundaries also pose problems for compliance with the nighttime coverage rule. These changes occur as a result of the passage of time and growth in the community. Initial sites that were able to comply with the nighttime coverage rule may no longer be in compliance as communities annex adjacent areas and change their boundaries. The resulting political boundaries can have unusual shapes that are impossible to fit within the required 80% nighttime coverage contour.

The nighttime coverage rule also serves as an entry barrier by requiring substantial compliance to be demonstrated in the application for a new site. Failure to demonstrate substantial compliance at the application stage results in waiver requests, which require expensive reports that either analyze each pocket of land to justify why it is not necessary to provide the requisite signal strength, or demonstrate that no other site can possibly be used that would comply with the rule. The applicant must endure uncertainty and delay, as it is not known whether the FCC will grant the waiver.<sup>196</sup>

To do away with these negative effects, the Commission should eliminate (or, at the very least, relax) the nighttime coverage rule. Elimination of the rule would allow AM stations to have much greater flexibility in site selection and the ability to move farther away from developed and costly downtown areas, owing to larger daytime city grade contours. Without this rule change, in order to maximize its daytime coverage and provide the requisite nighttime community coverage, the AM licensee is faced with the additional and extraordinary cost of

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<sup>196</sup> For instance, in Pamplin, 23 FCC Rcd at 650, n.2, the Commission's decision was made in January 2008, but the application was filed in January 2000. In situations where site loss is imminent, a station's survival could be doomed by waiting eight years to find out if its waiver request will be granted.

maintaining two AM transmission sites. Elimination of the nighttime community coverage requirement would remove this enormous burden.

Further, the elimination or relaxation of the nighttime coverage rule is consistent with the Commission's treatment of other AM policies. For example, Class D stations (former daytime stations) that have some nighttime service are not required to meet nighttime community coverage requirements. When the FCC adopted rules for the AM Expanded Band, it relaxed the nighttime coverage requirement from 80% to 50% because "close-in sites suitable for AM antennas are increasingly difficult (and expensive) to find."<sup>197</sup> The Commission recognized that "the 50% requirement nonetheless insures a signal of significant quality to the community of license and the added flexibility...to locate...facilities at cost effective locations."<sup>198</sup>

The Bureau previously granted waivers of the community coverage requirement for the purpose of enabling a minority-owned station to target coverage to minority populations within the community of license.<sup>199</sup> However, the proposal we advance today is race and gender neutral, such that the elimination or revision of the nighttime coverage rule would help all owners of AM stations substantially improve their daytime coverage. This flexibility would enable licensees to find new sites when their old sites are no longer available to them, thus providing an opportunity for struggling stations to find more cost efficient sites from which to operate, improve daytime service to the public, and conserve Commission resources by eliminating the need to review waiver requests on a case-by-case basis.

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<sup>197</sup> See Review of the Technical Assignment Criteria for the AM Broadcast Service, 6 FCC Rcd 6273, 6322 ¶153 (1991).

<sup>198</sup> Id. at 6323 ¶158.

<sup>199</sup> See, e.g., Brunson Broadcasting Co. of Maryland, Inc., 50 RR2d 941, 942 (Broadcast Bur. 1981).

**24. Relax Principal Community Coverage Rules For Commercial Stations [Proposal 49].<sup>200</sup>**

This proposal would increase flexibility in site location and provide opportunities to improve service for the intended audience.

The rule currently provides that commercial stations must provide coverage to 80 percent of their community of license.<sup>201</sup> The purpose of the community coverage rule is to provide sufficient signal coverage to the community of license.<sup>202</sup>

Many commercial stations, including most minority-owned stations, have difficulty covering their target audiences due, in part, to restrictions currently imposed by the Commission's community coverage rules.<sup>203</sup> Further, the rule limits the ability of commercial stations to move or make improvements because, if one of these stations wants to change its site,

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<sup>200</sup> See MMTC Radio Rescue Petition at pp. 14-17.

<sup>201</sup> The commercial FM rule states that a station must cover 100 percent of the community of license from its transmitter site. The Commission, however, has a "longstanding policy" to waive the rule to the 80% level. See CMP Houston-KC, LLC, 23 FCC Rcd 10656, 10657 n. 8 (2008). "The Commission traditionally accepts proposals that would cover at least 80 percent of the community of license as constituting substantial compliance" with the rule. See Barry Skidelsky, 7 FCC Rcd 5577, 5577 ¶3 (1992) (citing John R. Hughes, 50 Fed. Reg. 5679 (1985)).

<sup>202</sup> See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making, 20 FCC Rcd. 11169, 11184 ¶¶41-44 (2005) ("2005 Revision of Procedures Governing Amendments to FM Table of Allotments") (discussing a proposal to change the standards for relocating a station where the station is the community's only local service, "Because a station has a particular obligation to serve its community of license, a proposal claiming to provide first local transmission service is properly evaluated based on the community itself, rather than the community plus any outlying areas that might also receive aural service from the proposed facility.") See also Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, Report and Order, 94 FCC2d 152, 153 ¶3 (1983) ("When a new station is desired...[t]he proposed station must be located at a sufficient distance from pertinent co-channel and adjacent channel stations and still be capable of providing a strong signal over the desired community.")

<sup>203</sup> In some cases, communities have expanded and boundaries have changed since stations were originally licensed and these stations do not currently provide a 70 dBu signal to the community of license.

it must demonstrate that the station would cover at least 80 percent of the community from the new site. Often this proves to be impossible and it usually leads to a protracted waiver proceeding at a high cost in Commission resources.<sup>204</sup> Relaxing the rule would eliminate the need for waivers and permit Commission resources to be better used elsewhere.

It is also extremely difficult in and around large urban areas to find new tower sites. This difficulty, combined with the current commercial coverage requirements, limits commercial stations from changing sites and making other improvements that benefit the public interest.

To alleviate the hardships posed by the commercial coverage rule, the Commission should amend Sections 73.24(i) and 73.315(a) of the Commission's Rules, which govern the community of license coverage requirements for commercial stations,<sup>205</sup> to conform to the coverage requirements for non-commercial educational (NCE) stations.<sup>206</sup>

Section 73.515 of the Commission's Rules requires NCE stations to provide coverage to at least 50 percent of the community of license with a 60 dBu signal.<sup>207</sup> If a commercial station were permitted to cover only 50 percent of its community of license, then the remaining 50 percent of the community, in nearly all cases, would still receive a quality signal. Thus, modification of this rule would provide commercial licensees additional flexibility without materially frustrating the purpose of the rule.<sup>208</sup>

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<sup>204</sup> See, e.g., Community Communications Corp., 5 FCC Rcd 3413 (1990); Northland Broadcasters, 4 FCC Rcd 6508 (1989); George S. Flinn, Jr., 5 FCC Rcd 3015 (1990); Lester H. Allen, 15 FCC2d 767 (1968); Mid-Ohio/Capital Communications Limited Partnership, 5 FCC Rcd 424 (1990); Quality Broadcasting Corp., 62 FCC2d 586 (1977).

<sup>205</sup> See 47 C.F.R. §§73.24(i) and 73.315(a).

<sup>206</sup> See 47 C.F.R. §73.515.

<sup>207</sup> See 47 C.F.R. §§73.515 and 73.24. The commercial FM rule, 47 C.F.R. §73.315, bases coverage on a station's 70 dBu contour, and the commercial AM rule, 47 C.F.R. §73.24, bases coverage on a station's 5 mV/m contour. The NCE rule, Section 73.515, bases coverage on a station's 60 dBu contour.

<sup>208</sup> In a related vein, there is currently a distinction between the coverage required at the allotment stage and that required at the application stage for commercial FM stations desiring to

MMTC believes that modification of these rules will directly benefit small, women, minority, and all other broadcast licensees by providing them with additional flexibility for site location. As the Commission recognized when it modified the NCE community coverage rule, permitting NCE stations to cover 50 percent of the community of license “should ensure sufficient flexibility in siting facilities and reaching target audiences.”<sup>209</sup> At the same time, the Commission stated, “this modification balances the Commission’s mandate under Section 307(b) of the Act with the service, technical, and financial realities of operation NCE FM stations.”<sup>210</sup> This same flexibility should be afforded to commercial stations.

**25. Replace “Minimum Efficiency” Standard For AM Stations With A “Minimum Radiation” Standard [Proposal 50].<sup>211</sup>**

By changing this standard, the Commission would give stations increased flexibility in antenna choice and site selection. This distinction is especially crucial for the continued operation of entrepreneurs in the lower frequency bands who would be able to be able to move closer to their audience by increasing power and using less land.

The Commission’s minimum efficiency rules are found in Sections 73.45, 73.186 and 73.189 of the Rules.<sup>212</sup> The minimum efficiency standard dates back to the dawn of the Federal

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change community of license, channel, or class of channel. Specifically, applicants at the allotment stage must demonstrate coverage to 100 percent of the community of license. In 2006, the Commission eliminated the rulemaking stage of community of license change proposals. See FM Amendments Report and Order, 21 FCC Rcd at 14213 ¶¶4-9. This followed the previously eliminated rulemaking stage for channel and class of channel changes. See Amendment of the Commission's Rules To Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4736 ¶10 (1993). These changes are now accomplished by one-step applications. Thus, the distinction between the community coverage requirements should be eliminated and the 50 percent threshold should be adopted at both the allotment and application stages.

<sup>209</sup> Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules 15 FCC Rcd 21649, 21670 ¶42 (2000).

<sup>210</sup> Id.

<sup>211</sup> See MMTC Radio Rescue Petition at pp. 17-20. See also Commercial FM Radio Band Recommendation (“Allow Class A Stations to Use Low Towers and Higher-Than-Standard Power while Retaining Appropriate ERP Levels”); White Paper on FM Radio Rules at pp. 10-11.

Radio Commission. In a 1927 letter to Dr. Ralph Bown, President of the Institute of Radio Engineers, the Committee on Standardization of the Institute of Radio Engineers shed light on the origins of the minimum efficiency standard.<sup>213</sup> The letter makes several recommendations on best practices in power measurement<sup>214</sup> and discusses the rationale behind requiring antenna efficiency:

“...it is known that the efficiencies of antennas and the absorbing tendencies of various territories may vary widely from one station to another. Considering first the antenna efficiencies, it is evident that due to this factor two stations having identical transmitting sets of equal power rating may nevertheless deliver into space quite different amounts of power. This obviously puts a premium on good antenna efficiency, since the station with the better antenna, other things being equal, will give stronger signals to its listeners. Good antenna efficiency is certainly desirable, but it is a fair question as to whether this way of favoring it is just in all cases. For instance, to render a given service a station may find it cheaper to use a high-power set and an inefficient antenna than to use a lower-power set and a better antenna, since conditions local to the station may make an efficient antenna very expensive to construct. Yet either alternative might give identical service to the public.”<sup>215</sup>

As shown by this letter, in 1927 electric power was in short supply while land was widely available. Given the relative availability of land and electric power resources at that time it was appropriate to choose to use more land to conserve power. However, today, the relative availability of land and electric power are exactly reversed.<sup>216</sup> In circumstances, such as here,

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<sup>212</sup> See 47 C.F.R. §§73.45, 73.186 and 73.189. “All applicants for new, additional, or different AM station facilities and all licensees requesting authority to change the transmitting system site of an existing station must specify an antenna system, the efficiency of which complies with the requirements for the class and power of station. (See §§73.186 and 73.189.)” 47 C.F.R. §73.45(a).

<sup>213</sup> See Letter to Dr. Ralph Bown, President, Institute of Radio Engineers (Aug. 20, 1927) (on file with the National Archives and MMTC).

<sup>214</sup> *Id.* at 4 (“Your committee...recommends that broadcasting stations be rated in power in terms of antenna input computed by multiplying the plate-circuit input of the power vacuum tube or tubes by an assumed vacuum-tube efficiency[.]”)

<sup>215</sup> *Id.* at 5.

<sup>216</sup> See, e.g., Ruben N. Lubowski et al., *Major Uses of Land in the United States, 2002*, Economic Information Bulletin Number 14, United States Department of Agriculture (May

where the factual premise linking the regulation to the public interest has disappeared and no other fact, by itself, will support the regulation, the Commission must reevaluate the regulation to conform to its public interest obligation.<sup>217</sup>

The Commission expects its technical standards to be “based on the best engineering data available.”<sup>218</sup> However, a generation ago, the Commission acknowledged that these rules were outdated.<sup>219</sup>

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2006), available at <http://www.ers.usda.gov/publications/EIB14/eib14.pdf> (last visited Mar. 29, 2012) (demonstrating how land use has changed over the years). “Urban land area quadrupled from 1945 to 2002, increasing at about twice the rate of population growth over this period...[in terms of land ownership]. Over 60 percent (1,378 million acres) of U.S. land is privately owned. The Federal Government owns nearly 28 percent...State and local governments own about 9 percent...Over 2 percent...is in trust by the Bureau of Indian Affairs.” *Id.* at v. “The most consistent trends in major uses of land (1945-2002) have been an upward trend in special-use and urban areas...” *Id.* at 5. See also Cynthia Nickerson et al., Major Uses of Land in the United States, 2007, Economic Information Bulletin Number 89, United States Department of Agriculture (2011) at p. vi, available at <http://www.ers.usda.gov/Publications/EIB89/EIB89.pdf> (last visited Mar. 29, 2012) (“Urban land acreage quadrupled from 1945 to 2007, increasing at about twice the rate of population growth over this period. Land in urban areas was estimated at 61 million acres in 2007, up almost 2 percent since 2002 and 17 percent since 1990...”.) See also Electric Power Annual 2010:Table ES2. Supply and Disposition of Electricity, 1999 through 2010 (rel. Nov. 2011), available at <http://www.eia.gov/electricity/annual/> (last visited Mar. 29, 2012) (demonstrating the strides made in increasing the generation of electric power -- in 1999, for example, net generation of electric power was 3695 billion kilowatt hours (Kwh), in 2010 it was 4125. See also SOCR Data - Oil, Gas, Nuclear and Alternative Energy Resources, Production and Consumption, available at [http://wiki.stat.ucla.edu/socr/index.php/SOCR\\_Data\\_Dinov\\_071108\\_OilGasData](http://wiki.stat.ucla.edu/socr/index.php/SOCR_Data_Dinov_071108_OilGasData) (last visited Mar. 29, 2012) (total estimated consumption of fossil fuels in 1930 was 21.468 Quadrillion Btu and total estimated consumption of renewable energy in 1930 was 23.680 Quadrillion Btu). Compare U.S. Energy Consumption by Energy Source, 2004-2008 (rel. Aug. 2010), available at [http://www.eia.gov/cneaf/solar.renewables/page/\\_rea\\_data/table1\\_1.pdf](http://www.eia.gov/cneaf/solar.renewables/page/_rea_data/table1_1.pdf) (last visited Mar. 29, 2012) (total energy consumption of all energy sources, including fossil fuels, electricity net imports, nuclear electric power and renewable energy was 99.438 Quadrillion Btu).

<sup>217</sup> See *Geller v. FCC*, 610 F.2d 973, 980 (1979).

<sup>218</sup> 28 Fed. Reg. 13596 (1963) (Section 73.181(b) described the standards for collecting data) (on file with MMTC).

<sup>219</sup> See Re-Examination of Technical Regulations, Notice of Inquiry and Proposed Rule Making, 48 Fed. Reg. 14399 ¶11 (Apr. 4, 1983) (“Re-Examination NOI”); Re-Examination of Technical Regulations, Report and Order, 99 FCC2d 903 (1984). “Much of the rationale behind these [minimum performance standards] is no doubt seated in the traditional regulatory concepts applied to the broadcast services and the high degree of standardization and uniformity of



A rule that requires minimum efficiency imposes substantial hardship on lower frequency stations because, provided that the minimum radiation is achieved, efficiency levels are immaterial. Currently, lower frequencies are having trouble meeting the minimum efficiency standard due to the large size of the antenna required to meet the standard. Although frequencies are inversely related to antenna size—the lower the frequency, the larger the antenna must be—lower frequencies provide better coverage. Thus, using minimum radiation rather than minimum efficiency allows the lower frequencies more flexibility in powering the station.

DCS urges the Commission to replace “minimum efficiency” for AM antennas with “minimum radiation” in mV/m, thereby allowing AM stations to use very short antennas and enjoy more flexibility in site selection including rooftop installations.

By replacing “minimum efficiency” with “minimum radiation,” the Commission would allow increased flexibility in antenna choice and site selection. This flexibility will enable small businesses and entrepreneurs, operating in the lower frequency band, many of whom are having trouble meeting the efficiency levels, to continue their operations by increasing power and using less land, thus providing the opportunity to move closer to larger, more viable areas.

**26. Create A New Local “L” Class Of LPFM Stations [Proposal 52].<sup>220</sup>**

By implementing this proposal, the Commission would advance its localism goals by allowing small stations with limited service options to meet the needs of local communities.

This proposal envisions a new local “L” Class of LPFMs that would be entitled to primary service status upon having operated for two years as a significantly local service. This proposal would promote diversity by enabling an array of media voices and, due to their limited

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technical quality which is a part of that traditional view of the service. The broadcast service of today, however, is quite different from that of many years ago. There appear to be stronger market incentives today to control performance and thus reduce the need for detailed regulations.” Re-Examination NOI, 48 Fed. Reg. at 14399 ¶11.

<sup>220</sup> See MMTC Radio Rescue Petition at pp. 27-28.

service range, LPFMs present a unique opportunity to serve the needs of individual communities thereby enhancing localism.<sup>221</sup>

In its quest to preserve LPFM service by appealing to Congress and limiting the number of translator applications, the Commission should revisit and explore the potential that LPFM has to promote localism.<sup>222</sup> Support for local service is found in Section 307(b) of the Communications Act and in the Commission's promulgation of the localism requirements, which includes the goal of increasing local service.<sup>223</sup> Creating a new "L" Class for local LPFMs would allow small stations with limited service ranges to meet the needs of individual communities thus advancing the Commission's goal of localism.

**27. Collect, Study And Report On Minority And Women Participation In Each Step Of The Broadcast Auction Process [Proposal 69].**

Similar to Proposal #1, which urges the Commission to examine the impact each proceeding and transaction will have on minority ownership, this proposal urges the Commission to gather data on its auction process that can be used to determine best practices and opportunities for improvement. As the Commission has acknowledged its "general lack of data on minority participation, which could inform decisions and help the Commission gauge the

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<sup>221</sup> See Comments of the Civil Rights Organizations, Creation of a Low Power Radio Service, MM Docket No. 99-25 (Aug. 3, 1999) at p. 9 ("CRO Low Power Radio Comments"). The Supreme Court has noted that "diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC v. NCCB*, 436 U.S. 775, 780 (1978).

<sup>222</sup> See, e.g. *Economic Impact of Low-Power FM Stations on Commercial FM Radio: Report to Congress Pursuant to Section 8 of the Local Community Radio Act of 2010*, 2012 FCC LEXIS 35, pp. 1-2, 9 (2012) (recognizing that "the Local Community Radio Act of 2010 ("LCRA"), signed into law by President Obama on January 4, 2011, seeks to expand licensing opportunities for low-power FM ("LPFM") stations," and also that "In enacting the LCRA, Congress sought to increase the number of licenses available for LPFM stations by relaxing certain restrictions that limit the placement of LPFM stations, particularly in urban areas.") See also *Local Community Radio Act of 2010*, Pub. L. 111-371, 124 Stat. 4072 (2011).

<sup>223</sup> See 47 U.S.C. 307(b). See also CRO Low Power Radio Comments at p. 6 (citing to *Revision of FM Broadcast Rules*, 40 FCC 662, 664 (1962); *WHW, Inc. v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985)).

effectiveness of its actions on an ongoing basis,”<sup>224</sup> gathering data in the manner suggested will enable the Commission to meet its requirements under Section 257 of the Communications Act. Section 257 requires the Commission to review and submit a report to Congress every three years on the regulations enacted and legislative recommendations to eliminate market entry barriers for entrepreneurs and small businesses.<sup>225</sup>

**28. Redefine Community Of License As A “Market” For Section 307 Purposes [Proposal 71].<sup>226</sup>**

This recommendation would foster minority ownership by enabling exurban stations to “move-in” closer to their core audiences. These stations are disproportionately minority-owned and are competitively disadvantaged by the distance between their transmitters and the majority of their audiences. The proposal, introduced and later refined by the Diversity Committee,<sup>227</sup> recognizes that radio listeners, as well as advertisers in a metropolitan area seldom, if ever, identify a local station by its municipality of license but, rather, identify the station with the metropolitan area.<sup>228</sup> However, new policies recently adopted by the Commission place

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<sup>224</sup> See Section 257 Triennial Report, 26 FCC Rcd at 2965 ¶4 (2011).

<sup>225</sup> See 47 U.S.C. §257.

<sup>226</sup> See Recommendation on Diversifying Ownership in Terrestrial Radio, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (Dec. 10, 2007) (“Diversifying Ownership Recommendation”); see also Commercial FM Radio Band Recommendation.

<sup>227</sup> See Commercial FM Radio Band Recommendation; White Paper on FM Radio Rules at p. 16. See also Diversifying Ownership Recommendation (modifying the 2004 proposal to read: “where permitted by the contour overlap and community of license coverage rules, and upon a satisfactory showing, the Commission would authorize full power AM or FM radio stations to change their communities of license to any community within the same market (as “radio market” is defined in 47 C.F.R. §73.3555(a)), provided that if the community of license being vacated (the “Original Community”) has no other full power AM or FM or LPFM station licensed to it and which originates local programming for at least 15% of its airtime (a “Local Service LPFM”), the licensee vacating the Original Community must underwrite the cost of licensing, construction and one full year of operation of a new Local Service LPFM to be licensed to the Original Community.”)

<sup>228</sup> See Commercial FM Radio Band Recommendation; White Paper on FM Radio Rules at p. 16.

insurmountable barriers on any radio station seeking to relocate into an urban area to serve the broadcaster's core audience.<sup>229</sup>

The Diversity Committee's proposal recommends that: "where permitted by the contour overlap and community of license coverage rules, and upon a satisfactory showing, the Commission would authorize full power AM or FM radio stations to change their communities of license to any community within the same market (a "radio market" as defined in 47 C.F.R. §73.3555(a)), provided that if the community of license being vacated (the "Original Community") has no other full power AM or FM or LPFM station licensed to it and originates local programming for at least 15% of its airtime (a "Local Service LPFM"). The proposal also requires that the licensee vacating the Original Community underwrite the cost of licensing, construction and one full year of operation of a new Local Service LPFM to be licensed to the Original Community."<sup>230</sup>

The proposal, if implemented, would increase the number of listeners reached by exurban stations, enhancing competition and affording listeners with opportunities for more diverse programming. It could also increase minority broadcast ownership. These "move-in" requests to the Commission to relocate stations from less populated areas into urban areas would help minority owned stations to secure a footprint in larger markets where they traditionally may not have entrepreneurial opportunities, as "move-in" stations can "promote diversity in metropolitan

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<sup>229</sup> See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, 26 FCC Rcd 2556, 2576-2572 ¶¶20-27 (2011), pet. for recons. pending ("Allotment and Assignment Procedures Policy Order") (revising evaluation procedures under Section 307(b) to in part "de-emphasize differences in population coverage as a principal metric in awarding Section 307(b) preferences, and to adopt a more realistic evaluation of the totality of a proposed station's service in lieu of the current narrow focus on the specified community of license.") The Commission rejected the claim that "allowing new service in, or community of license changes to relocate to, urbanized areas will necessarily result in greater levels of service to minority populations," and held that "we do not believe that an expanded Section 307(b) evaluation will prevent applicants from proposing new service in or near urbanized areas." Id.

<sup>230</sup> See Diversifying Ownership Recommendation at p. 1.

markets.”<sup>231</sup> The General Counsel of the National Association of Media Brokers has explained that “minority owners, noncommercial operators, and other new entrants have financing as their biggest obstacle to acquiring a station in a major market. The few stations that do become available in major markets are often priced far too high for new entrants. But move-in stations, with no cash flow or established business, are often priced so as to be attractive to new buyers (and as most big group owners are close to their ownership limits in many markets, and preserving cash in these economic times, there is often little competition for the purchase of such stations from the established market operators).”<sup>232</sup> By changing the community of license rules to effectuate the relocation of exurban stations into urban areas, the Commission would have the opportunity to rectify the harmful consequences of its new policies when it acts on reconsideration and provide minority-owned stations with chances to make a significant impact in larger markets.

**29. Increase Broadcast Auction Discounts To New Entrants  
[Proposal 43].<sup>233</sup>**

DCS urges the Commission to increase new entrant auction discounts and auction discounts for small broadcast owners. A study performed for the Commission in 2000 found that small and minority broadcasters are less likely to win in the auction process,<sup>234</sup> and that due to

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<sup>231</sup> See David Oxenford, FCC Proposes to Encourage Rural Radio By Making it More Difficult to Move Radio Stations to Urban Areas, *Broadcast Law Blog* (Apr. 26, 2009), available at <http://www.broadcastlawblog.com/2009/04/articles/fm-radio/fcc-proposes-to-encourage-rural-radio-by-making-it-more-difficult-to-move-radio-stations-to-urban-areas/#more> (last visited Mar. 29, 2012).

<sup>232</sup> See *id.*

<sup>233</sup> See Reply Comments of the Minority Media and Telecommunications Council, Competitive Bidding Procedures FM Auction 79, AU Docket No. 09-21 (Apr. 1, 2009) at p. 1. (“MMTC Auction 79 Reply Comments”).

<sup>234</sup> See William D. Bradford, Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes (2000) at pp. vii-ix, available at [http://transition.fcc.gov/opportunity/meb\\_study/capital\\_market\\_study.pdf](http://transition.fcc.gov/opportunity/meb_study/capital_market_study.pdf) (last visited Mar. 29, 2012) (“Bradford Study”).

capital market discrimination, minority broadcast [and wireless] license holders are “less likely to be accepted in their applications for debt financing, after controlling for the effect of the other variables on the lending decision.”<sup>235</sup> Thus, DCS recommends that the Commission help improve the condition of new entrants and small broadcast owners in the auction process by adopting this proposal, which was originally submitted by Mullaney Engineering<sup>236</sup> and endorsed by MMTC.<sup>237</sup> Specifically, the Mullaney proposal calls for an increase in discounts, to new entrants, from 35% to 60%, and an increase in discounts, for existing broadcast owners that own fewer than three facilities, from 25% to 40%.<sup>238</sup> The twenty facilities requirement that was applied in previous auctions is unhelpful to new entrants and smaller operators. DCS agrees that these discounts should be substantially augmented, both to facilitate broadcast ownership for new applicants and to offset the effects of the ineffective requirements that the Commission applied in the past.

**30. Require Minimum Opening Bid Deposits On Each Allotment For Bidders Bidding For An Excessive Proportion Of Available Allotments [Proposal 44].**<sup>239</sup>

This proposal seeks to eliminate a market entry barrier caused by a practice that requires only nominal consideration in exchange for stating an intention to bid on an excessive percentage of allotments available at an auction. Specifically, DCS urges the Commission to require bidders who bid for an excessive proportion of the available allotments – i.e. 10% or more – to place on deposit the Minimum Opening Bid for all of the allotments for which they bid.<sup>240</sup> The practice

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<sup>235</sup> See *id.* at pp. vi-vii.

<sup>236</sup> See Comments of Mullaney Engineering, Inc., Competitive Bidding Procedures FM Auction 79, AU Docket 09-21 (Mar. 20, 2009) at p. 2 (“Mullaney Comments”).

<sup>237</sup> See MMTC Auction 79 Reply Comments at p. 1.

<sup>238</sup> See Mullaney Comments at p. 2.

<sup>239</sup> See MMTC Auction 79 Reply Comments at p. 2.

<sup>240</sup> See *id.* (citing Mullaney Comments at p. 3).

of allowing bidders to simply state their intentions to bid, while only providing nominal consideration in exchange, is a market entry barrier that the Commission has clear Section 257 authority to remedy.<sup>241</sup>

**31. Only Allow Subsequent Bids To Be Made Within No More Than Six Rounds Following The Initial Bid [Proposal 45].<sup>242</sup>**

This proposal urges the Commission to increase transparency and efficiency in the bidding process by putting a stop to a practice that raises monitoring costs for small bidders. Currently, the Commission allows bidders to place bids *ad infinitum* throughout the competitive bidding process, thereby needlessly increasing the monitoring costs of smaller bidders who wish to remain the highest bidder. Therefore, when auctioning allotments, the Commission should allow subsequent bids to be made within no more than six (6) rounds following the initial bid.<sup>243</sup> This proposal will increase transparency and expedite the bidding process.

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<sup>241</sup> See *id.*; see also 47 C.F.R. §1.2106 (“The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment.”)

<sup>242</sup> See MMTC Auction 79 Reply Comments at p. 2 (citing to Mullaney Comments at p. 3).

<sup>243</sup> See *id.*; see also Mullaney Comments at p. 3 (“Modify the auction rules to state that once a bid is placed on an allotment and no subsequent bids are placed during the next 6 subsequent rounds then the auction of that specific allotment is closed...[Mullaney] served as the bidder for a client in which the last 55 rounds resulted in no additional bids and resulted in needless expenditure of money on his part.”)

**32. Require Bidders To Specify An Intention To Bid Only On Channels With A Total Minimum Bid Of Four Times Their Deposit, And Designate A Second Place Bidder If The Winning Bidder Withdraws [Proposal 46].<sup>244</sup>**

This recommendation was proposed to prevent smaller bidders from being discouraged from participating in auctions by very large bidders, and to allow the second place bidder to have a chance to win a license if (as often happens) the winning bidder abandons the channel.

Potential bidders should not be permitted to specify they intend to bid on all auctioned facilities when their down payments are insufficient to meet these obligations. Instead, bidders should be able to specify their intention to bid on channels that have a total minimum bid of four times their deposits. In past auctions, smaller bidders that sought to obtain a handful of channels were apparently frightened away when they saw dozens of potential and speculative opponents for their channels.<sup>245</sup> The Commission should also allow a second-place bidder to be designated as a winner when the high bidder withdraws.<sup>246</sup> This would allow the Commission to avoid the

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<sup>244</sup> See Comments of the Minority Media and Telecommunications Council, Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005 (Auction 62), DA 05-1076 (Apr. 29, 2005) at pp. 5-6. See also Auction of FM Broadcast Construction Permits Scheduled for Mar. 27, 2012; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 93, 76 Fed. Reg. 78645, 78656 ¶¶125-126 (Dec. 19, 2011) (“Procedures for FM Broadcast Auction”). The Commission recently released procedures for an upcoming auction, “[t]he minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid for the construction permit. After there is a provisionally winning bid for a permit, the minimum acceptable bid amount will be a certain percentage higher. That is, the minimum acceptable bid amount will be calculated by multiplying the provisionally winning bid amount times one plus the minimum acceptable bid percentage. The Bureaus will begin the auction with a minimum acceptable bid percentage of 10 percent. Thus, the minimum acceptable bid amount will equal (provisionally winning bid amount) (1.10), rounded. The eight additional bid amounts are calculated using the minimum acceptable bid amount and a bid increment percentage, which will be 5 percent for the beginning of Auction 93.” Id.

<sup>245</sup> See id. at p. 6 (referencing Auction 37).

<sup>246</sup> See, e.g. Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005, Public Notice, DA 05-1076 (Apr. 14, 2005) at p. 1, n. 1, available at



expense of re-auctioning a permit, the public would receive service more rapidly, and applicants would be rewarded for prudence.

**33. Mathematical Touchstones: Tipping Points For The Non-Viability Of Independently Owned Radio Stations In A Consolidating Market And Quantifying Source Diversity [Proposal 26].<sup>247</sup>**

DCS proposed two formulas for crafting and implementing diversity initiatives at the Commission. The “Tipping Point Formula” illustrates how the Commission could ensure that local radio markets could preserve independent owners and the “Source Diversity Formula” which expresses the consumer benefit derived from marginal increases in source diversity.

The “Tipping Point Formula” was based on the premise that independent owners each need determinable and quantifiable revenue streams in order to stay afloat and provide service to the public. The formula acknowledges the existence of a tipping point in the distribution of radio revenue in a market between cluster owners and independents. When the combined revenues of a market’s cluster owners exceed this tipping point, the independents can no longer survive. By identifying this tipping point, the formula provides a rational basis for determining whether a transaction would limit diversity. For example:

Suppose a market has twelve stations and six licensees -- two four-station platforms and four standalones. Each independent requires

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[http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-05-1076A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-05-1076A1.pdf) (last visited Mar. 29, 2012) (broadcasters were requesting waivers to get priority as the second highest bidder). See also Procedures for FM Broadcast Auction, 76 Fed. Reg. at 78657 ¶145 (Dec. 19, 2011). “Any winning bidder that defaults or is disqualified after the close of the auction (i.e., fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full payment, or is otherwise disqualified) will be subject to the payments described in 47 CFR 1.2104(g)(2). This payment consists of a deficiency payment, equal to the difference between the amount of the Auction 93 bidder’s winning bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter’s bid or of the subsequent winning bid, whichever is less. The percentage of the applicable bid to be assessed as an additional payment for defaults in Auction 93 was established at twenty percent of the applicable bid.” Id.

<sup>247</sup> See DCS 2007 Initial Comments at pp. 53-54.

\$150,000 in fixed operating costs just to survive on the air, and an additional \$100,000 per year to “thrive” -- *i.e.*, provide a meaningful local service (*e.g.*, having a news department, originating public affairs programs and producing its own PSAs). Since the independents are not equal to one another in financial stability and resources, an additional \$200,000 in market revenues (an average of \$50,000 per station) must be available to spread around among the independents so that the weakest well-run independent will survive. Similarly, the independents will collectively need another \$100,000 (an average of \$25,000 per station) so that the weakest well-run independent will provide a meaningful local service. On these admittedly rough assumptions, the independents collectively would need \$1,300,000 per year in revenue in order to provide viewpoint diversity -- \$700,000 of which is needed just to keep them all alive. Suppose the radio revenues in the market are \$3,000,000 per year. In this market, if the top two groups take no more than \$1,700,000 (\$3,000,000 minus \$1,300,000) -- that is, 57% of the revenue, they would not inhibit viewpoint diversity. At that “local service tipping point,” the independents must begin to lay off their programming staff and start simulcasting or airing satellite feeds almost exclusively. Further, if the top two groups take no more than \$2,300,000 (\$3,000,000 minus \$700,000) -- that is, 77% of the revenue, they will not threaten the survival of their competitors. That 77% figure is the “survival tipping point” at which the independents begin to go dark or desperately seek buyers at any distress price.<sup>248</sup>

The Source Diversity Formula is based on the premise that increases in consumer utility flow from their access to additional sources, with diminishing returns to scale. This formula would require field-testing before it could be applied in practice to measure source diversity.<sup>249</sup>

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<sup>248</sup> Reply Comments of the Minority Media and Telecommunications Council, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317 (May 8, 2002) at pp. 22-24, available at <http://apps.fcc.gov/ecfs/document/view?id=651319124> (last visited Mar. 29, 2012). These comments also introduced the variables and coefficients of the formula. *See id.* at pp. 24-27.

<sup>249</sup> The Source Diversity Formula is based on the Herfindahl-Hirschman Index (HHI) with variables for X = consumer welfare derived from viewpoint diversity; P = a program consumed from a particular source; g = the number of programs from a particular source that are available for consumption; C = the number of consumers consuming a particular program; T = consumers’ mean media consumption time devoted to the absorption of viewpoints in a particular program; Z = consumers’ mean attentiveness to a particular program; m = a source (including all outlets owned by that source), and n = number of differently-owned sources offering programs which are consumed. The Formula would read:

### 34. **Must-Carry For Certain Class A Television Stations [Proposal 28].**<sup>250</sup>

DCS urges the Commission to designate a new sub-class of must-carry Class A stations that are hyper-local or provide multicultural and multilingual service.

Class A low power television (LPTV) stations are required to originate local programming.<sup>251</sup> Approximately 15% of Class A stations are minority owned and many provide multicultural and multilingual service that is not available from full-power stations.<sup>252</sup>

DCS is mindful of the unintended consequences that blanket Class A must-carry would impose on cable systems that may have limited capacity. Some Class A stations broadcast only minimal local programming and no multicultural or multilingual programming, and thus offer the public little in the way of diversity of viewpoints and information. As such, the public would be better served if the Commission would create and entitle to must-carry a new sub-class of Class A stations that are hyper-local or that provide extensive multicultural and (especially) multilingual service.

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$$X = n^{1+(1/n)} \sum_{m=1}^n \left( \sum_{p=1}^m CTZ \right)$$

See Reply Comments of the Diversity and Competition Supporters, 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277 et al. (Feb. 3, 2003) at pp. 17-24, available at <http://apps.fcc.gov/ecfs/document/view?id=6513410943> (last visited Mar. 29, 2012).

<sup>250</sup> See DCS Third FNPRM Comments at p. 23. See also 2007 DCS Supplemental Ex Parte Comments at pp. 10-11; Reply Comments of the Community Broadcasters Association, MB Docket 06-121 et al. (Nov. 1, 2007) at p. 2, available at <http://apps.fcc.gov/ecfs/document/view?id=6519809043> (last visited Mar. 29, 2012).

<sup>251</sup> See 47 U.S.C. §336(f)(2)(A)(i).

<sup>252</sup> See DCS 2007 Supp. Comments at 10 (citing and attaching, in Appendix D, the Declaration of Rosamaria Caballero, President, Caballero Television Texas LLC (Nov. 12, 2007)).

**35. Conduct Tutorials On Radio Engineering Rules At Headquarters And Annual Conferences [Proposal 33].<sup>253</sup>**

By implementing this proposal, the Commission would promote compliance and reduce the regulatory burden of the Commission's complex technical rules that serve as a barrier to entry for small business and minority ownership.

The Commission's media ownership rules and technical radiofrequency rules have gradually evolved over many decades and, as a result, have become increasingly complex over time. Due to this complexity, it is extremely difficult for small and local radio broadcasters to fully understand and comply with the existing radio regulatory regime. Furthermore, unlike the largest broadcasters, which can easily disperse the cost of obtaining the necessary regulatory expertise over several stations and thereby take full advantage of the Commission's radio rules, smaller broadcasters must expend substantially more resources per station to remain abreast of, and in compliance with, the radio rules. This serves as a further competitive disadvantage to small radio broadcasters and also creates substantial barriers for new entrants to the radio broadcast industry. The net result of the complexity of the current radio regulatory framework is to reduce the number of independent voices available to the listening public and reduce diversity of radio station ownership.

To help enable small businesses and nonprofits to compete in the new regulatory environment, the Commission should conduct tutorials on the radio engineering rules at the Commission's headquarters and at the annual conferences of organizations that represent the interests of broadcasters, and in particular diverse broadcasters, such as:

- The annual conferences of the National Association of Black Owned Broadcasters ("NABOB"). NABOB is the first and largest trade organization representing the interests of African-American owners of radio and television

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<sup>253</sup> See MMTC Radio Rescue Petition at pp. 44-47.

stations across the country. NABOB hosts two annual broadcast management conferences—one in the spring and one in the fall.<sup>254</sup> The conferences focus on critical issues and trends in the broadcast industry that impact the growth of minority broadcast entrepreneurs.

- The Access to Capital and Telecom Policy Conference, held annually by MMTC. This conference is the largest minority media and telecom financial forum in the nation, and attracts entrepreneurs, service providers, bankers, private equity investors, Members of Congress and FCC Commissioners.<sup>255</sup>

Broad public dissemination and understanding of the existing radio rules and any new rules adopted pursuant to this Petition are necessary for the proposals to achieve their maximum effectiveness in benefiting small businesses and diverse owners.

This proposal is consistent with the Commission's existing practice of providing outreach to the public by holding workshops and tutorials at the Commission's Washington D.C. headquarters, as well as at other locations around the country.<sup>256</sup>

Moreover, such outreach is consistent with President Obama's directive that the federal government during his administration will "disclose information rapidly in forms that the public can readily find and use" and will use "innovative tools, methods, and systems to cooperate... with nonprofit organizations, businesses, and individuals in the private sector."<sup>257</sup>

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<sup>254</sup> For additional information on the NABOB's Fall Broadcast Management Conference and Spring Broadcast Management Conference, please visit the NABOB website, available at <http://www.nabob.org/events.html> (last visited Mar. 29, 2012).

<sup>255</sup> For further information about MMTC's Access to Capital Conference, please visit MMTC's website, available at <http://mmtconline.org> (last visited Mar. 29, 2012).

<sup>256</sup> See, e.g., FCC Workshops, Tutorials & Roundtables, available at <http://transition.fcc.gov/realaudio/workshops.html> (last visited Mar. 29, 2012). See also WTB Auction <http://transition.fcc.gov/realaudio/auction-seminars.html> (last visited Mar. 29, 2012); Rural Broadband Educational Workshops, available at <http://wireless.fcc.gov/outreach/index.htm?job=workshop> (last visited Mar. 29, 2012); FCC Events Page, available at <http://www.fcc.gov/events> (last visited Mar. 29, 2012).

<sup>257</sup> Transparency Memorandum, *supra* n. 56. Although the Commission is not an Executive Branch agency, the public interest would nevertheless be served by Commission efforts to comply with the directives set forth in the Transparency Memorandum.

By conducting the proposed tutorials, the Commission could ensure that its existing rules and any new rules adopted in response to this Petition are fully understood by, and are accessible to current diverse radio stations owners, managers, and engineers, and potential new entrants into the radio market. Furthermore, by holding the tutorials at the annual conferences of broadcast organizations, the Commission could make this information available to broadcasters throughout the country including those that would be financially challenged to attend tutorials held in the Commission's Washington, D.C. headquarters.

**36. Develop An Online Resource Directory To Enhance Recruitment, Career Advancement, And Diversity Efforts [Proposal 60].<sup>258</sup>**

This proposal suggests the Commission foster diversity by dedicating a portion of its website to diversity. The topics covered should cover a variety of areas, including employment diversity and information for financiers and minorities and women seeking access to capital.

In 2004 the Diversity Committee recommended that the Commission dedicate a portion of its website to host an online resource directory for employment and supplier diversity to help businesses enhance recruitment, career development, and diversity initiatives.<sup>259</sup> In 2009, the Diversity Committee again made a recommendation for the Commission to dedicate a portion of its website to diversity efforts – this time tackling the access to capital barrier.<sup>260</sup> The 2009 Recommendation urged the Commission to include educational materials for lenders, investors, and minorities and women seeking capital for broadcast transactions with topics ranging from an

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<sup>258</sup> See generally Recommendation for an Online Diversity Resource Directory, Career Advancement Subcommittee, Advisory Committee for Diversity in the Digital Age (Dec. 10, 2004), available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Resource Directory” (last visited Mar. 29, 2012) (“Recommendation on Online Diversity Resource Directory”); see also Funding Acquisitions Recommendation at pp. 2-4.

<sup>259</sup> See Recommendation on Online Diversity Resource Directory (the director would include links to trade associations, industry foundations, training programs, research and reports, and relevant news).

<sup>260</sup> See Funding Acquisitions Recommendation at p. 2.

overview, valuation, and an explanation of nuances for lenders, investors, and diverse business interested in the broadcast industry.<sup>261</sup>

**37. Engage Economists To Develop A Model For Market-Based Tradable Diversity Credits As An Alternative To Voice Tests [Proposal 27].<sup>262</sup>**

This proposal, which was developed by the Diversity Committee,<sup>263</sup> envisions the evolution of command and control regulations and structural ownership limits based on voice tests, to a new diversity policy portfolio that would be developed from a system of market-based, tradable Diversity Credits. A certain number of Diversity Credits would be given to SDBs. These credits would also be given to the seller at the close of a transaction so long as that transaction results in greater structural diversity. If a transaction would increase concentration, the buyer would be expected to return some of its Diversity Credits to the Commission at the close of the transaction. Companies could also buy or sell these credits to one another, thus providing a market-based source of access to capital for SDBs. A similar paradigm has been successfully implemented by the EPA to replace much command-and-control environmental regulation.<sup>264</sup>

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<sup>261</sup> See *id.* at pp. 2-3.

<sup>262</sup> See DCS 2007 Initial Comments at pp. 54-55.

<sup>263</sup> See Preliminary Report and Recommendation, Transactional Transparency and Related Outreach Committee, Advisory Committee on Diversity in the Digital Age (May 14, 2004) at p. 3, available at <http://transition.fcc.gov/DiversityFAC/meeting061404.html>, then follow link to “Preliminary Report and Recommendation” (last visited Mar. 29, 2012) (“The continuation and acceleration of consolidation in the broadcast and telecom industries, and the Commission’s inherent authority to review aspects of license-transfer applications, indicates that diversity may be a public interest value worthy of specific assessment. Moreover, a system of regulatory “credits” and possibly creation of a market-driven mechanism (analogous to those employed in other public interest areas such as wetland preservation and air pollution) seems achievable.”)

<sup>264</sup> Environmental Protection Agency Cap and Trade Program, available at <http://www.epa.gov/captrade/index.html> (last visited Mar. 29, 2012). See also Robert N. Stavins, Market-Based Environmental Policies, *Public Policies for Environmental Protection* (1998); Robert N. Stavins, What Can We Learn from the Grand Policy Experiment? Lessons from SO<sub>2</sub> Allowance Trading, 12 *J. of Economic Perspectives* 69 (1998); Robert N. Stavins, “Market-Based Environmental Policies: What Can We Learn from U.S. Experience (and Related

Diversity Credits would (1) incentivize diversity, (2) disincentivize consolidation, (3) place on the beneficiaries of consolidation the responsibility of paying for the remediation of some of consolidation's ill effects, (4) serve as a mechanism to provide access to capital to SDBs, (5) capture the measure of diversity more precisely than an inherently approximate voice test, and (6) allow for easier administration than a system of voice tests and waivers. The Commission should ask the Office of Strategic Planning and Policy Analysis to examine the viability and desirability of Diversity Credits.

**38. Remove Non-Viable FM Allotments [Proposal 40].<sup>265</sup>**

To increase spectrum efficiency and increase opportunities for new entry, the Commission should remove non-viable FM allotments.

Numerous vacant allotments waste space on the spectrum because of an uncertain and complicated rulemaking procedure, favoring maintenance of the vacant allotment, is required before the Commission will delete it.<sup>266</sup> Almost seven years have elapsed since the Commission

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Research) (July 2, 2003) available at [http://www.elsociety.org/searlecenter/jep/advanced/Stavins\\_Market\\_Based.pdf](http://www.elsociety.org/searlecenter/jep/advanced/Stavins_Market_Based.pdf) (last visited Mar. 29, 2012), cf. Cass Sunstein, "Television and the Public Interest", 88 *Calif. L. Rev.* 499 (2000) (exploring how the environmental market-based paradigm could be applied to television programming).

<sup>265</sup> See MMTC Radio Rescue Petition at pp. 22-23. See also Commercial FM Radio Band Recommendation ("Conduct a Comprehensive Channel Search for New FM Allotments"); White Paper on FM Radio Rules at pp. 11-13; Comments of the Minority Media and Telecommunications Council, RM-10960 (May 24, 2004), available at <http://mmtconline.org/lp-pdf/MMTCCCommentsFirstMediaPFRM.pdf> (last visited Mar. 29, 2012) ("the Commission should ask Congress to appropriate funds for spectrum-clearing incentive grants to failing rural station owners.")

<sup>266</sup> First Broadcasting Investment Partners, LLC, Amendment of the Commission's Rules Governing Modification of FM and AM Authorizations, Petition for Rulemaking, at 19 (filed on Mar. 5, 2004) ("First Broadcasting Petition for Rulemaking"). See also e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Altamont, Oregon), NPRM, MB Docket No. 11-167 (Oct. 14, 2011) (instituting an NPRM for comments and reply comments to determine whether a winning bidder can substitute their channel for a vacant channel), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-1711A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1711A1.pdf) (last visited Mar. 29, 2012).



postponed removing “non-viable” FM allotments.<sup>267</sup> With the electronic database now showing 671 vacant allotments, the time is ripe for the Commission to revisit this proposal.<sup>268</sup>

These burdensome regulations result in inefficient use of spectrum space, which literally bar participation from new entrants and make it difficult for existing stations to improve or expand their service.<sup>269</sup> The Commission should remove non-viable FM allotments. As the Commission auctions vacant allotments, the allotment for any channel placed for auction that does not produce a successful bidder should be deleted. Allotments should be deleted where any winning bidder fails to construct and license the facility, unless the permit is sold to a qualified eligible entity.<sup>270</sup>

Deleting non-viable FM allotments would foster diversity by allowing stations to upgrade and expand thus enabling increased minority and new entrant participation and higher quality broadcasting. Deleting vacant allotments would also promote diversity by allowing space for other stations to expand. The deletion of these allotments would benefit the communities where vacant allotments are situated by allowing other stations to take their places and provide new service.<sup>271</sup>

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<sup>267</sup> See 2005 Revision of Procedures Governing Amendments to FM Table of Allotments, 20 FCC Rcd at 11172 ¶11 (2005).

<sup>268</sup> See 47 C.F.R. §73.202. The count of 671 vacant allotments was made by MMTC as of Mar. 20, 2012.

<sup>269</sup> See, e.g., First Broadcasting Petition for Rulemaking at 19-20 (stating “these [vacant] allotments—which provide no current benefits to the public whatsoever—prevent other licensees from expanding their signal coverage. In addition, the presence of these long-vacant allotments thwarts the addition of new allocations in nearby more populated areas which could obtain an allotment and support a station if the vacant allotment was not present.”)

<sup>270</sup> See DCS 2012 Initial Comments at pp. 14-21.

<sup>271</sup> See First Broadcasting Petition for Rulemaking at 22.

**39. Study The Feasibility Of A New Radio Agreement With Cuba [Proposal 42].<sup>272</sup>**

This proposal would set the foundation for creating an international radio agreement between Cuba and the United States for the purpose of reducing and ultimately eliminating interference issues that threaten small business and minority broadcasters – particularly those in Florida where, in many markets including Miami, minorities are now the majority of the population and where, in every market, public safety needs in hurricane season require uninterrupted multilingual radio service.

Radio interference has been a source of conflict between the United States and Cuba for many years.<sup>273</sup> The North American Radio Broadcasting Agreement (NARBA),<sup>274</sup> signed in 1950, was the last radio agreement between the United States and Cuba. In accordance with NARBA, which was signed by the U.S., the Bahama Islands, Canada, Cuba, Dominican Republic, and Jamaica, medium wave AM radio stations in these countries were reallocated. This treaty required clear channel frequencies to be set aside across the radio dial, at a rate of about one per 100 kHz and generally reserved channels 1230, 1240, 1340, 1400, 1450, and 1490 for local stations. The agreement also officially expanded the upper limit of the AM broadcast spectrum from 1500 kHz to 1600 kHz.

NARBA remains in effect with respect to the U.S. and the Bahamas and the U.S. and the Dominican Republic<sup>275</sup> but has been superseded by U.S.-Canada and U.S.-Mexico working

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<sup>272</sup> See MMTTC Radio Rescue Petition at pp. 42-44.

<sup>273</sup> Federal Communications Commission's Observation of TV Marti, p. 4 (May 11, 1990), available at <http://www.state.gov/documents/organization/28512.pdf> (last visited Mar. 29, 2012) (discussing interference from AM signals originating from Cuba).

<sup>274</sup> North American Regional Broadcasting Agreement, Final Protocol to the Agreement Resolutions and Recommendations, 11 UST 413, TIAS 4460 (Nov. 15, 1950).

<sup>275</sup> 47 C.F.R. §73.1650(b)(6).

agreements for AM radio.<sup>276</sup> Cuba has withdrawn from NARBA and is only subject to the basic regional provisions established by the International Telecommunications Union (ITU).<sup>277</sup>

Although Cuba is subject to the ITU provisions, ongoing radio interference problems between the U.S. and Cuba persist. A generation ago there was an attempt to solve the radio interference problems by bilateral discussions between the U.S. and Cuba, but consensus has yet to be achieved.<sup>278</sup>

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<sup>276</sup> There are two U.S.-Canada Agreements. See Agreement Between the Government of the United States of America and the Government of Canada Relating to the AM Broadcasting Service in the Medium Frequency Band (1984) (535-1605 kHz band), Federal Communications Commission, Broadcast Agreements with Canada, available at <http://transition.fcc.gov/ib/sand/agree/files/can-bc/can-am.pdf> (last visited Mar. 29, 2012); Interim Working Arrangement Between the Federal Communications Commission and the Department of Communications Relating to the AM Broadcasting Service in the Medium Frequency Band (1991) (1605-1705 kHz band), Federal Communications Commission, Broadcast Agreements with Canada, available at <http://transition.fcc.gov/ib/sand/agree/files/can-bc/16051705.pdf> (last visited Mar. 29, 2012). There are also two U.S.-Mexico Agreements. See Agreement Between the Government of the United States of America and the Government of the United Mexican States Relating to the AM Broadcasting Service in the Medium Frequency Band, (1986) (535-1605 kHz band), Federal Communications Commission, Radio Agreements By Frequency, available at <http://transition.fcc.gov/ib/sand/agree/files/mex-bc/am.pdf> (last visited Mar. 29, 2012); Agreement Between the Government of the United States of America and the Government of the United Mexican States for the Use of the Band 1605 to 1705 kHz in the AM Broadcasting Service, (1992) (1605-1705 kHz band), Federal Communications Commission, Radio Agreements By Frequency, available at <http://transition.fcc.gov/ib/sand/agree/files/mex-bc/expandbc.pdf> (last visited Mar. 29, 2012). See also 47 C.F.R. §73.1650.

<sup>277</sup> Final Acts of the Regional Administrative MF Broadcasting Conference (Region 2) Rio de Janeiro, Brazil, International Telecommunications Union (1981) (sets forth the principle that stations broadcasting in the medium wave (AM) band shall not employ power exceeding that necessary to maintain economically an effective national service of good quality within the frontiers of the country concerned).

<sup>278</sup> Radio Marti Issue Brief Number IB83105, Library of Congress Congressional Research Service, May 1984, p. 6 (“U.S. officials were optimistic after those meetings and a related meeting in Geneva in June 1981 that the Cubans were anxious to work out technical solutions to interference.”) See, e.g., U.S. Radio and Television Aggression Against Cuba Recognized as Illegal by the World Radio Communications Conference (Feb. 23, 2012), available at <http://cubaldirect.posterous.com/022312-minrex-havana-press-release-us-radio-a> (last visited Mar. 29, 2012) (“After two weeks of intensive discussions and negotiations, the World Radio Communications Conference at its session in Geneva, Switzerland, joined Cuba’s initiative of entrusting the Director of the International Telecommunication Union’s Radio Communication

The Commission should request that the Department of State study the feasibility of a new treaty with Cuba to afford mutual protection to existing and proposed AM stations. In order to end the radio interference problems that continue to plague AM radio stations as well as ensure the viability of existing and future AM radio in the U.S., the Commission should strongly urge the Department of State to explore the adoption of a new radio treaty with Cuba.

Studying the feasibility of a new radio agreement with Cuba would start the process of eliminating interference. This would ensure that stations within the range of interference could continue to operate and create opportunities for new stations to enter the market.

**40. Create A New Civil Rights Branch Of The Enforcement Bureau With Staff And Compliance Officers For EEO, Transactional, Advertising And Procurement Nondiscrimination For All Platforms [Proposal 62].<sup>279</sup>**

This recommendation was proposed to make certain that when civil rights measures are adopted, the Commission will marshal them in through an enforcement office with the skills, subject matter expertise, and resources necessary to ensure compliance. The new Civil Rights Branch of the Enforcement Bureau should encompass the Media Bureau's Equal Employment Opportunity ("EEO") staff and also include compliance officers for transactional and advertising nondiscrimination enforcement. In the spirit of platform neutrality, this new branch should apply

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Bureau with the mandate to follow up on the interference provoked by the US Government's radio-electric aggression to the Cuban radio and television services, and report to the next Conference to be held in 2015. The Conference so confirmed the validity of the conclusion adopted in its previous session, in which the illegal nature of the anti-Cuba radio and television broadcasts by US authorities by using aircrafts was recognized.")

<sup>279</sup> See Letter from David Honig, Executive Director of MMTC, to Hon. Michael J. Copps, Interim Chair of the Federal Communications Commission, RE: Structural and Procedural Reforms in FCC Operations (Jan. 21, 2009) at p. 3, available at [http://mmtconline.org/lp-pdf/MMTC\\_Letter\\_on\\_FCC\\_Processes\\_012109.pdf](http://mmtconline.org/lp-pdf/MMTC_Letter_on_FCC_Processes_012109.pdf) (last visited Mar. 29, 2012). See also Diversity Committee Procurement Recommendation *supra* n. 73.

civil rights regulations uniformly across every technology platform, including broadcasting, cable, satellite, wireless and wireline.<sup>280</sup>

**41. Legislative Recommendation To Expand The Telecommunications Development Fund (TDF) Under Section 614 And Finance TDF With Auction Proceeds [Proposal 13].<sup>281</sup>**

If sufficiently funded, the TDF could help eliminate market entry barriers, including lack of access to capital, for small, minority, and women entrepreneurs.

In 1996, Congress created the Telecommunications Development Fund (TDF) to provide financing to small and disadvantaged businesses, particularly those owned by minorities and women. Section 707 of the 1996 Telecommunications Act restricts the primary funding for TDF to the interest earned on up-front deposits paid by telecommunications companies that qualify to bid for FCC licenses in spectrum auctions.<sup>282</sup> Thus, no interest has been earned by TDF on the tens of billions deposited as down payments or auction proceeds.

Unfortunately, the TDF has had little impact on access to capital for minority broadcasters.<sup>283</sup> It took years for the TDF to earn \$50 million from the interest on upfront

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<sup>280</sup> See, e.g., Proposal 10 at pp. 21-23 *supra*.

<sup>281</sup> See MMTC Legislative Recommendations to Advance Diversity in the Media and Telecommunications Industries (Jan. 21, 2009) at p. 4, available at [http://mmtconline.org/lp-pdf/MMTC\\_Legis\\_Recommendatns\\_012109.pdf](http://mmtconline.org/lp-pdf/MMTC_Legis_Recommendatns_012109.pdf) (last visited Mar. 29, 2012) (“MMTC Legislative Proposals”); see also Diversity Committee Recommendations on Spectrum and Access to Capital at p. 6 (recommending that the type of funding and amount of funding available through TDF be expanded). See also Recommendations from the March 24, 2010 Meeting, Advisory Committee for Diversity in the Digital Age (Mar. 24, 2010) at p. 2, available at <http://transition.fcc.gov/DiversityFAC/recommendations.html>, then follow link to “Recommendations from the March 24, 2010 Meeting” (last visited Mar. 29, 2012) (“Diversity Committee 2010 TDF Recommendation”).

<sup>282</sup> See 47 U.S.C. §309(j)(8)(C).

<sup>283</sup> See, e.g., TDF Investment Themes, available at <http://www.tdfund.com/investment-themes/> (last visited Mar. 29, 2012) (Key themes are: network transformation, broadband access, video distribution, special efficiency, mHealth, software service, and energy efficiency).

auction deposits, a fairly insignificant amount in a capital-intensive industry.<sup>284</sup> At the moment, the TDF administers current investments but cannot make new ones. It also appears that funding for the TDF will not be replenished as the national budget for fiscal year 2013 proposes to eliminate funding for the program.<sup>285</sup>

In 2010 the Diversity Committee urged the Commission to recommend that Congress recalibrate TDF to prioritize access to capital for historically disadvantaged communities and to diversify the scope of TDF support.<sup>286</sup> Specifically, the Diversity Committee recommended:

1. Focusing on access to capital for historically disadvantaged populations, for example, providing greater service to minorities and women through race-neutral full file review of applicants.<sup>287</sup>
2. Diversifying products by offering a balanced portfolio of loans, grants, equity investments and educational services.
3. Diversifying deal sizes by providing micro loans, and participating in larger deals by providing mezzanine financing.
4. Diversifying the scope of the industries in which it participates by investing in the many sub-fields of telecommunications, such as placing a greater focus on broadcasting and cable.<sup>288</sup>

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<sup>284</sup> See S. Jenell Trigg, Esq., “Section 714 – The Telecommunications Development Fund: Making a Difference? The Success and Failure of the 1996 Telecommunications Act (Civil Rights Forum on Communications Policy, ed., 2002).”, available at [http://www.civilrights.org/publications/1996\\_telecommunications/section-714.html](http://www.civilrights.org/publications/1996_telecommunications/section-714.html) (last visited Mar. 29, 2012) (“In reality it took TDF almost four years to receive \$25 million in funding. Today, TDF is capitalized in the amount of \$50 million. But in the context of the high cost of telecommunications properties and capital intensive nature of starting new telecommunications services particularly post the 1996 Act, \$50 million is not a lot of money.”)

<sup>285</sup> See The White House Budget for Fiscal Year 2013 at p. 1412, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/appendix.pdf> (last visited Mar. 29, 2012) (stating that “the Budget proposes to eliminate new funding for TDF, as the program has not had a significant impact, and has experienced losses on the funds that it has invested in telecommunications firms. The Administration supports other programs, including multi-billion dollar universal service programs and small business credit programs, which have greater impact and accountability.”)

<sup>286</sup> See Diversity Committee 2010 TDF Recommendation.

<sup>287</sup> See DCS 2012 Initial Comments at p. 19-21 (urging the Commission to act on the Diversity Committee’s subsequent recommendation on creating an overcoming disadvantages preference).

<sup>288</sup> Id.

DCS agrees. The TDF should also be funded with interest earned from all spectrum auction proceeds, including down payments. Flexibility is needed to allow auction proceeds to be deposited in an escrow account that can generate maximum interest is also needed. Further, in addition to providing equity financing, TDF should be required to provide debt financing, but with flexible and advantageous terms and conditions to offset a unfavorable lending practices and the tight credit market.<sup>289</sup>

**42. Legislative Recommendation To Amend Section 257 To Require The Commission To Annually Review And Remove Or Affirmatively Prohibit Known Market Entry Barriers Including Bundling, Bonding, Excessive Minimum-Years-In-Business Requirements, Preferences For Loans Over Grants, And Previous Large Project Experience; Authorize An Annual Media And Telecom Diversity And Digital Divide Census, And Expand The Scope Of Section 257 To Afford The Commission Ancillary Jurisdiction Over Civil Rights Enforcement For Title I And Title II Services [Proposal 14].<sup>290</sup>**

This proposal encourages the Commission to ask for increased authority to track and promote diversity in the communications industries in order to implement better policies and eliminate discrimination.

Congress should require the FCC to collect and maintain annual longitudinal statistical data, and anecdotal evidence on EEO, procurement, transactions and advertising by media and telecommunications companies, and provide an authorization and an appropriation for this purpose.

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<sup>289</sup> See, e.g. GAO Media Ownership Report at p. 24 (“Industry representatives and experts we interviewed also identified the scale of ownership as a barrier for minorities and women.... When stations become available for sale, investors and other financing entities prefer multiple station purchases rather than single station purchases in order to capture economies of scale. Like trading, such transactions favor incumbent companies that are well established over new entrants such as minorities and women.”)

<sup>290</sup> See MMTC Legislative Proposals at pp. 4-5 (encouraging the Congress to authorize a media and telecom diversity and digital divide census).

Through Sections 257, 303(g) and 403 of the Communications Act, the Commission already has extensive general authority to collect evidence needed to support its civil rights and diversity objectives. However, the Commission does not collect EEO, procurement and transactions data. And unfortunately its broadcast ownership database is so muddled that the Commission itself acknowledged, in the Diversity Order, that its ownership data collection methods could be improved.<sup>291</sup>

There are no constitutional impediments to the collection of racial data, as long as the data is not applied in an unconstitutional manner.<sup>292</sup> Courts have upheld the collection of racial statistics in numerous instances. In Parents Involved, Justice Kennedy encouraged the collection of racial data as a means to achieve a diverse student body.<sup>293</sup> Relevant raw statistical data on race and ethnicity may be collected regardless of a party's fear of misuse.<sup>294</sup>

Conducting an annual diversity census would aid the Commission in addressing minority access to spectrum, access to capital and access to opportunity. Current and accurate data is vital as the Commission monitors its current rules and formulates new and improved policies to eliminate discriminatory practices and market entry barriers for minorities.

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<sup>291</sup> See Diversity Order at 5954-55 ¶¶94-96.

<sup>292</sup> See Bush v. Vera, 517 U.S. 952, 962-971 (1996) (holding that state use of computer software that applied racial data in a manner that made racial classification a dominate factor weighed in favor of applying strict scrutiny to congressional redistricting in Texas).

<sup>293</sup> See Parents Involved, 551 U.S. at 789 (Justice Kennedy stated that “school boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”)

<sup>294</sup> See United States v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1976) (holding that “purely hypothetical misuse of data” concerning race and ethnicity “does not require the banning of reasonable procedures to acquire such data.”)



**43. Legislative Recommendation To Clarify Section 307(b) To Provide That Rules Adopted To Promote Localism Are Presumed To Be Invalid If They Significantly Inhibit Diversity [Proposal 15].<sup>295</sup>**

This proposal asks Congress to update and clarify Section 307(b) to ensure that the statute and the Commission's resulting localism rules do not operate to lock in the present effects of past discrimination.

Originally codified in the 1927 Radio Act, Section 307(b) of the 1934 Communications Act requires the Commission to “make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”<sup>296</sup> Certainly this provision was necessary in the early days of radio, when there was a significant risk that high demand for radio frequencies in large cities would leave rural areas without service.

Yet today, Section 307(b) inhibits diversity and does little or nothing to ensure that broadcasters meet local needs. Relying on what it believes Congress intended over three generations ago, today's FCC awards construction permits to those who game the system by proposing first services to tiny hamlets. A licensing process giving an advantage to “first service” for a hamlet is nonsensical when, since 1981, licensees are under no specific obligations to respond to their community.<sup>297</sup>

Further, the Commission's move-in restrictions make it almost impossible to relocate most stations closer to major cities, where large multicultural and multilingual audiences often

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<sup>295</sup> See MMTTC Legislative Proposals at p. 9.

<sup>296</sup> 47 U.S.C. §307(b).

<sup>297</sup> See Deregulation of Radio, Report and Order, 84 FCC2d 968, 971 ¶9 (1981) (“We are eliminating the [non-entertainment programming] guideline and retaining only a generalized obligation for commercial radio stations to offer programming responsive to public issues. Under certain circumstances, the issues may focus upon those of concern to the station's listenership as opposed to the community as a whole...”).

lack stations serving their specific needs.<sup>298</sup> Minority broadcasters often would like to serve these audiences, but since these broadcasters entered the industry two generations late, they often face the competitive disadvantage of operating with the only stations they could buy – those licensed to distant suburbs. Thus, in the name of localism, the Commission has precluded new diverse local service that could meet the local needs of our increasing diverse central cities. Further, these move-in restrictions lock in and perpetuate the present effects of past racial discrimination in broadcast licensing and financing.<sup>299</sup>

Congress should update and clarify Section 307(b) to provide that FCC rules adopted to promote localism will be presumed invalid when these rules significantly inhibit diversity.

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<sup>298</sup> See generally MMTCC Radio Rescue Petition (discussing how structuring engineering rules to provide greater flexibility for site selection and benefit minority owned stations). See also e.g., LaVonda N. Reed-Huff, Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio, 12 Wash. & Lee J. Civil Rts. & Soc. Just. 97, 99, n. 5 (2006) (citing the contention that Black-oriented news appears increasingly unavailable on commercial radio in large cities with sizeable Black populations because of a decrease in local ownership and control).

<sup>299</sup> See Allotment and Assignment Procedures Policy Order, 26 FCC 2576-2579 at ¶¶36-39 (the Commission determined that “in the case of community of license changes, we will adopt certain changes designed to require more specificity on the part of licensees and permittees regarding the actual effects of the proposed moves, while still affording flexibility to propose truly favorable arrangements of radio allotments and assignments. Specifically, first we adopt the urbanized area service presumption ... Additionally, applicants not qualifying for Priority (3) preferences under this standard will still be able to make a Priority (4) showing that will require them to provide a more detailed explanation of the claimed public interest benefits of the proposed move.”) Many feel that the move-in restrictions place undue burdens on stations seeking to relocate. See, e.g., David G. O’Neil, FCC’s New Rules for Rural AM and FM Radio Service Make Waves but Miss the Mark, TelecomMediaTech Law Blog (Mar. 7, 2011), available at <http://www.telecommediatechlaw.com/broadcast/fccs-new-rules-for-rural-am-and-fm-radio-service-make-waves-but-miss-the-mark/> (last visited Mar. 29, 2012) (contending that “the FCC’s new procedures also are tilted against relocating new or existing radio stations near or within urbanized areas. Concerned with the alleged migration of new and existing radio stations from rural markets to urbanized markets, the FCC creates roadblocks and imposes high costs for parties interested in a station near or within an urbanized area,” and adding that the new “showings impose a financial burden that will deter many applicants from proceeding.”)

**44. Legislative Recommendation To Amend The FTC Act (15 U.S.C. §§41-58) To Prohibit Racial Discrimination In Advertising Placement Terms And Advertising Sales Agreements [Proposal 16].<sup>300</sup>**

This proposal urges the Commission to recommend that Congress address the problem of the “supply side” of advertising discrimination by specifically authorizing the FTC to enforce a prohibition against “no urban/no Spanish” dictates by advertisers, while the FCC works with broadcasters to address the demand side.

In the Diversity Order, the FCC adopted a regulation requiring broadcasters seeking license renewal to “certify that their advertising sales contracts do not discriminate on the basis of race or gender” and, further, to certify that these contracts contain nondiscrimination clauses.<sup>301</sup> The Broadcast Advertising Nondiscrimination Rule, which took effect on July 15, 2008, was the first new federal civil rights mandate on any subject in 31 years.

The Broadcast Advertising Nondiscrimination Rule takes aim at the insidious practices of “No Urban Dictates” (NUDs) and “No Spanish Dictates” (NSDs). NUDs and NSDs are instructions by advertisers to their agencies not to buy (or to buy only at reduced rates) advertising on stations largely reaching African Americans or Hispanics. NUDs and NSDs are generally premised on baseless stereotypes, particularly the belief that the presence of a critical mass of minority shoppers in a store will discourage white patronage at that store. MMTC, NABOB and others have found that service and retail businesses frequently use NUDs and NSDs, including restaurants, hotels, amusements parks, cruise lines, casinos, clothing stores, hair salons, jewelers and automobile dealerships. Extrapolating from FCC-sponsored and other

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<sup>300</sup> See MMTC Legislative Proposals at pp. 12-13.

<sup>301</sup> See Diversity Order, 23 FCC Rcd. at 5975. See also id. at 5942 ¶50; FCC Enforcement Bureau Releases Advisory on Requirement for Broadcasters to Certify that Advertising Contracts are Non-Discriminatory (Mar. 22, 2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-305332A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305332A1.pdf) (last visited Mar. 29, 2012).

research findings, MMTC has estimated that NUDs and NSDs cost minority-owned radio at least \$200,000,000 in revenues annually. Minority-focused television and cable programming is hit hard as well.

Resistance to civil rights laws has always been greatest when money is involved; thus the FCC's jurisdiction over broadcasters may not be enough to stop NUDs and NSDs. The FTC's Consumer Protection Bureau oversees advertising practices, and thus the FTC could play a vital role in rooting out and prosecuting discriminatory advertisers.

To address the supply side of this equation, DCS urges the Commission to recommend that Congress amend the FTC Act. The FTC Act authorizes the FTC to proscribe unfair and deceptive acts or practices as well as anticompetitive practices.<sup>302</sup> However, on its own, the FTC cannot simply assume authority over discrimination in advertising by declaring that NUDs and NSDs are inherently unfair, deceptive and anticompetitive. After all, virtually any lawbreaking by businesses is unfair and deceptive and it is done to gain a competitive advantage; tax cheating, pollution and employment discrimination are all unfair, deceptive and anticompetitive, but Congress has not delegated the FTC to become a super-IRS, a super-EPA or a super-EEOC.

On the other hand, the FCC is unlikely to be able to cure advertising discrimination rapidly without assistance from the FTC. Like any commercial transaction, discriminatory advertising has a supply side and a demand side. The FCC can address the demand side, but only the FTC can address the supply side.

Thus, the FTC needs direction from Congress instructing the FTC, in cooperation with the FCC, to ban racial discrimination in the placement and terms of broadcast advertising. In this way, the FTC and FCC could work together, through an interagency memorandum of understanding (MOU), to attack both the supply and demand sides of advertising discrimination.

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<sup>302</sup> See 15 U.S.C. §§41-58.

A model can be found in the way the FCC and FTC avoided conflict and duplication of duties, and improved overall enforcement effectiveness, with their 2003 MOU implementing the National Do-Not-Call Registry.<sup>303</sup>

New antidiscrimination legislation could draw from the complaint, investigation, probable cause and remedy provisions of Title VII of the 1964 Civil Rights Act, which offers complainants, including laypersons, an inexpensive and often expeditious administrative remedy for employment discrimination.<sup>304</sup> Further, Congress should give the FTC express authority to require nondiscriminatory advertising placement and terms and nondiscrimination provisions in the advertising contracts of companies in media industries not directly regulated by the FCC, including print and Internet advertising.

**45. Legislative Recommendation To Amend Section 614 To Increase Access To Capital By Creating A Small And Minority Communications Loan Guarantee Program [Proposal 17].<sup>305</sup>**

This proposal could be implemented and administered by the SBA to increase access to capital for women and minority entrepreneurs. In conjunction with the recommendation to expand TDF and finance the fund with auction proceeds,<sup>306</sup> Congress should create a small and minority communications loan guarantee program to be administered by the SBA.<sup>307</sup> The

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<sup>303</sup> See Federal Trade Commission, Annual Report to Congress for FY 2003 and 2004, Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry (Sept. 2005) at Appendix, available at <http://www.ftc.gov/reports/donotcall/051004dncfy0304.pdf> (last visited Mar. 29, 2012). See also Memorandum of Understanding between the FCC and EEOC, 70 FCC2d 2320 (1978).

<sup>304</sup> See 42 U.S.C. §2000e, *et seq.*

<sup>305</sup> See Diversity Committee Recommendations on Spectrum and Access to Capital at p. 6.

<sup>306</sup> See Proposal 41 *supra* at p. 81.

<sup>307</sup> See What SBA Does to Help Small Businesses Businesses Grow, available at <http://www.sba.gov/content/what-sba-offers-help-small-businesses-grow> (last visited Mar. 29, 2012). While the SBA does not make direct loans to businesses owners, it will guarantee loans through the Guaranteed Loan Program (Debt Financing) and Bonding Program (for Surety Bonds). *Id.*

Commission should also explore existing loan programs that could be easily extended to increase access to capital by minority communications entrepreneurs. As stated at pp. 43-44 *supra*, lack of access to capital is the primary barrier to entry for women and minority entrepreneurs desiring to enter the communications industry. The establishment of such a loan program by Congress would evidence its support for greater communications industry diversity and provide women and minorities with much needed funding streams.

**46. Legislative Recommendation To Amend Section 614 To Create An Entity To Purchase Loans Made To Minority And Small Businesses In The Secondary Market [Proposal 18].<sup>308</sup>**

This proposal was offered by the Diversity Committee in 2004 to provide minority and women businesses with more opportunities to access capital. The Diversity Committee envisioned that this entity would operate like Fannie Mae, a government sponsored organization that helps to maintain a healthy cash flow to mortgage lenders for the purpose of supporting the housing and mortgage market,<sup>309</sup> to purchase loans made to minority businesses and boost diversity in the secondary market. In this manner, the number of loans made available to minority businesses could increase, while these businesses could avert capital market discrimination that serves as a barrier to obtaining financing their operations.<sup>310</sup>

**47. Legislative Recommendation to Provide A Tax Credit For Companies That Donate Broadcast Stations To An Institution Whose Mission Is Or Includes Training Minorities And Women In Broadcasting [Un-numbered Proposal].**

The goal of this proposal is to incentivize donations of broadcast stations to training institutions to ensure that minorities and women have an opportunity to enter the broadcast

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<sup>308</sup> See Diversity Committee Recommendations on Spectrum and Access to Capital at p. 6.

<sup>309</sup> See Company Overview, Fannie Mae, available at <http://www.fanniemae.com/portal/about-us/company-overview/about-fm.html>? (last visited Mar. 29, 2012); Our Charter, Fannie Mae, available at <http://www.fanniemae.com/portal/about-us/governance/our-charter.html> (last visited Mar. 29, 2012).

<sup>310</sup> See Bradford Study at pp. vi-vii.

industry. Mentorship and guidance have been recognized as potentially “invaluable” to the success of entrepreneurship.<sup>311</sup> In the communications industry, programs and initiatives that offer guidance and training can provide significant opportunities for minorities to gain experience in the industry and tap into professional networks that can further their careers.<sup>312</sup>

DCS believes that companies that donate broadcast stations to organizations that help train minorities, women, and socially disadvantaged groups should be rewarded through the use of tax credits. Specifically, DCS recommends that the Commission propose race-neutral legislation that includes the following fundamental features: (1) provides businesses with a tax credit for qualified broadcast station transfers including transfer of title, transfer of control, and assignment of licenses, (2) ensures that a transfer credit would only go to those who donate radio or television broadcast stations to organizations that expressly agree to provide broadcasting and management training for women and economically and socially disadvantaged individuals, and (3) includes a monitoring feature in which the Commission analyzes and reports to Congress on the impact the legislation has on increasing broadcast diversity in the areas ownership, management and programming, and whether the legislation should be renewed.<sup>313</sup>

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<sup>311</sup> See, e.g., Small Business Administration, Steps to Finding a Mentor, available at <http://www.sba.gov/content/steps-finding-mentor> (last visited Mar. 29, 2012).

<sup>312</sup> See, e.g., Minorities in Broadcasting Training Program, Testimonials, available at <http://www.thebroadcaster.com/testimonial.html> (last visited Mar. 29, 2012).

<sup>313</sup> Eligible organizations under a new tax credit could consist of categories of institutions that are defined in a manner that the courts have affirmed to be race-neutral, including Historically Black Colleges and Universities (HBCU), Native American-serving Institutions (NASIs), Asian American and Native American Pacific Islander-serving Institutions, Hispanic-serving Institutions (HSIs), and 501(c)(3) or 501(a) tax-exempt organizations that have provided broadcast training and broadcast station management for women and economically and socially disadvantaged persons who have traditionally been underrepresented in the broadcast industry.

## **CONCLUSION**

This Commission has made tremendous strides in broadband, universal service, and spectrum policy. Its time now for the Commission to take bold steps in media policy to reduce the scarcity of minority and women ownership and participation in the broadcast industry. These proposals address market barriers found in legislation, regulations, and practice. We are committed to working with the Commission to implement policies that advance diverse participation in the communications industries.

Respectfully submitted,

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April 3, 2012



## **APPENDIX**

### **THE DIVERSITY AND COMPETITION SUPPORTERS (DCS)**

1. A. Philip Randolph Institute
2. American Indians in Film and Television
3. Asian American Chamber of Commerce
4. Asian American Justice Center
5. Black College Communication Association
6. Black Entertainment and Sports Lawyers Association
7. Black Leadership Forum
8. Broadband & Social Justice Institute
9. Communications Consumers United
10. Dialogue on Diversity
11. Hispanic Association of Colleges and Universities
12. Hispanic Elected Local Officials
13. International Black Broadcasters Association
14. Japanese American Citizens League
15. Joint Center for Political and Economic Studies
16. Lawyers' Committee for Civil Rights Under Law
17. League of United Latin American Citizens
18. Latinos in Information Sciences and Technology Association
19. MANA – A National Latina Organization
20. Minority Media and Telecommunications Council
21. National Association of Black County Officials
22. National Association of Black Journalists
23. National Association of Black Owned Broadcasters
24. National Association of Black School Educators
25. National Association of Black Telecommunications Professionals
26. National Association of Hispanic Publications
27. National Association of Multicultural Digital Entrepreneurs
28. National Association of Neighborhoods
29. National Association for the Advancement of Colored People
30. National Black Caucus of Local Elected Officials
31. National Black Caucus of State Legislators
32. National Black Church Initiative
33. National Black Coalition for Media Justice
34. National Coalition on Black Civic Participation
35. National Conference of Puerto Rican Women
36. National Congress of Black Women, Inc.
37. National Council of La Raza
38. National Council of Negro Women
39. National Hispanic Foundation for the Arts
40. National Indian Telecommunications Institute
41. National Newspaper Publishers Association
42. National Organization of Black County Officials
43. National Organization of Black Elected Legislative Women
44. National Puerto Rican Chamber of Commerce

45. National Urban League
46. Native American Journalists Association
47. Native American Public Telecommunications
48. Rainbow PUSH Coalition
49. Universal Impact
50. Women's Institute for Freedom of the Press